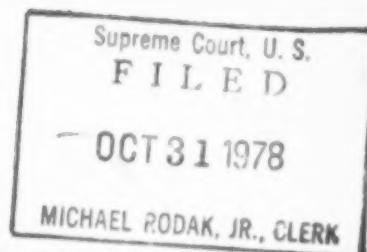


APPENDIX  
Volume IV  
Pages 942a to 1266a



IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA  
COMPANY, INC.,

*Petitioner,*

—against—

FEDERAL TRADE COMMISSION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1977  
CERTIORARI GRANTED MARCH 20, 1978

## TABLE OF CONTENTS

### VOLUME I

	PAGE
Chronological List of Relevant Docket Entries .....	1a
Complaint, issued October 8, 1971 .....	2a
Answer of A&P, filed November 15, 1971 .....	10a
Application of A&P for Issuance of Subpoena Duces Tecum, filed November 15, 1971 .....	14a
EXCERPTS FROM TRANSCRIPTS OF TESTIMONY*	
(ALPHABETICAL)	
Abrahms, Robert (Glen & Mohawk Milk Association) .....	496a
Archer, Harry (Borden) .....	182a
Barnes, Robert (Wallies Market) .....	414a
Barney, Edward (Model Food Center) .....	396a
Bartels, Ira (A&P) .....	293a
Bitting, R. John (FTC) .....	426a
Cannon, Frank T. (Bowman) .....	452a
Corbus, William (A&P) .....	550a
Cox, James (Jim's Grocery) .....	419a
Dean, Samuel E. (Dean Foods) .....	447a
Dischner, Eugene (Borden) .....	540a

---

\* The only changes made in the excerpts of testimony, which appear in this Appendix in chronological order, are those contained in the administrative law judge's "Order Correcting Transcript" dated September 23, 1975.



1892-93

W/E. 9 25 1965

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL	14512	10,130.73	
2	HOMO VD MILK	GAL	11671	8,602.53	
3	HOMO VD MILK	1/2 GAL	81353	29,978.51	
4	HOMO VD MILK	QTS	38317	7,663.40	
7	CHOC MILK	QTS	2850	694.39	
8	CHOC MILK HANDI-PK1/2	PTS	1328	86.04	
9	CHOC SHAKE	1/2 PTS	7535	700.75	
10	CHOC SKIM	1/2 GAL	1296	447.39	
12	BUTTERMILK	1/2 GAL	4503	1,659.25	
13	BUTTERMILK	QTS	8185	1,637.00	
15	GOLDEN DEL-GLASS	GAL	3725	2,421.25	
16	GOLDEN DEL	1/2 GAL	9428	3,255.33	
17	FORT SKIM	1/2 GAL	8021	2,769.54	
18	FORT SKIM	QTS	7641	1,464.67	
21	WHIPPING CREAM	1/2 PTS	2770	849.75	
22	HALF&HALF	QTS	922	543.48	
23	HALF&HALF	PTS	23666	7,061.82	
24	SOUR CREAM	16-OZ	2624	1,289.59	
25	SOUR CREAM	8-OZ	5812	1,437.74	
26	SOUR CREAM DIPS	8-OZ	1369	403.39	
28	ORANGE DRINK	1/2 GAL	243-	62.72-	
30	FRUIT PUNCH	1/2 GAL	130-	33.55-	
31	LEMONADE	1/2 GAL	58-	14.96-	
34	SOUR HALF&HALF	PTS	2232	798.49	
35	TRIPLE WHIP	8-OZ	987	403.42	
36	YOGURT	1/2 PTS	2050	417.71	
46	WAKE UP	PTS	372	78.31	
47	NUMBER GAL IN		18237	2,735.55	
50	NUMBER GAL OUT		19720-	2,958.00-	

\$ 84,460.30 \$ 107,065.93

PROPERTY TRADE COMMISSION

Docket No. 88-66  
 Reopened  
 4-2-87  
 4-2-87

6

987a

635315  
930 is

THE BORDEN COMPANY  
CENTRAL DIVISION  
1821 S. KILBOURN  
CHICAGO ILLINOIS 60623

Chicago &amp; Suburbs

W/E 9 18 1965

RECAP TOTALS

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL
1	HOMO-VG MILK-GLASS	14664	6981	10,236.82	79
2	HOMO-VG MILK	11296	7371	8,326.16	89
3	HOMO-VG MILK	79493	3685	29,293.08	47
4	HOMO-VG MILK	37617	20	7,523.40	26
7	CHOC MILK	2556	2437	622.71	33
8	CHOC MILK HANDI-PK 1 1/2	1281	0648	82.97	0875
9	CHOC SHAKE	14547	08 SPEC	1,163.76	125
10	CHOC SKIM	1227	3453	423.55	45
12	BUTTERMILK	4087	3685	1,505.99	47
13	BUTTERMILK	7726	20	1,545.20	26
15	GOLDEN DEL-GLASS	3802	65	2,471.30	75
16	GOLDEN DEL	9456	3453	3,265.05	45
17	FORT SKIM	7894	3453	2,725.69	45
18	FORT SKIM	7234	1917	1,386.55	25
21	WHIPPING CREAM	2850	3068	874.28	40
22	HALF&HALF	904	5895	532.88	78
23	HALF&HALF	23659	2484	7,059.73	39
24	SOUR CREAM	2630	4915	1,292.51	69
25	SOUR CREAM	5773	2474	1,428.11	39
26	SOUR CREAM DIPS	1330	2947	391.89	39
28	ORANGE DRINK	5	2581	1.29	35
31	LEMONADE	3	2581	.78	35
34	SOUR HALF&HALF	2360	3578	844.36	49
35	TRIPLE WHIP	706	4089	288.57	55
36	YOGURT	2188	2038	445.74	29
46	WAKE UP	449	2108	94.52	29
47	NUMBER GAL IN	18466	.15	2,769.90	
50	NUMBER GAL OUT	19308	(15)	2,896.20	

\$ 83,700.59 \$ 106,346.17

FEDERAL TRADE COMMISSION

100-108866

11-821

H

998a

634650

THE BORDEN COMPANY  
CENTRAL DIVISION  
1821 S. KILBOURN  
CHICAGO ILLINOIS 60623

CHICAGO & SUBURBS

RECAP TOTALS

W/E 9 11 1965

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HONG VD-MILK-GLASS	13628	.6981	9,513.59	.7900
2	HOMO VD MILK	10845	.7371	7,993.76	.8900
3	HOMO VD MILK	73548	.3685	27,102.31	.4700
4	HOMO VD MILK	34174	.2000	6,834.80	.2200
7	CHOC MILK	5301	.2000	SPEC 1,060.20	.3300
8	CHOC MILK HANDI-PK1/2	1005	.0648	65.11	.0875
9	CHOC SHAKE	6664	.093	619.76	.1250
10	CHOC SKIM	1112	.3453	383.82	.4500
12	BUTTERMILK	4086	.3685	1,505.60	.4700
13	BUTTERMILK	7385	.2000	1,477.00	.2600
15	GOLDEN DEL-GLASS	3564	.6500	2,316.60	.7500
16	GOLDEN DEL	8937	.3453	3,085.81	.4500
17	FORT SKIM	7299	.3453	2,520.22	.4500
18	FORT SKIM	6997	.1917	1,341.17	.2500
21	WHIPPING CREAM	2517	.3068	772.12	.4000
22	HALF&HALF	879	.5895	518.17	.7800
23	HALF&HALF	22323	.2984	6,661.03	.3900
24	SOUR CREAM	2727	.4915	1,340.23	.6900
25	SOUR CREAM	5610	.2474	1,387.78	.3900
26	SOUR CREAM DIPS	1275	.2447	375.77	.3900
28	ORANGE DRINK	20	.2581	5.16	.3500
30	FRUIT PUNCH	6	.2581	1.55	.3500
31	LEMONADE	11	.2581	2.83	.3500
34	SOUR HALF&HALF	2593	.3578	927.65	.4900
35	TRIPLE WHIP	621	.4089	253.83	.5500
36	YOGURT	1909	.2038	388.94	.2900
46	WAKE UP	427	.2108	89.89	.2900
47	NUMBER GAL IN	17192	.15	2,578.80	.15
50	NUMBER GAL OUT	18258-	(.15)	2,738.70-	.15
				\$ 78,384.80	\$ 99,718.29

FEDERAL TRADE COMMISSION

Doc't No. 8866-6  
RESIDENT

EXHIBIT NO. 1

I

6. 1. 1951

H/E 9 4 1965

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMC VD MILK-GLASS	GAL	15602	10,891.64	
2	HOMC VD MILK	GAL	12478	9,197.38	
3	HOMO VD MILK	1/2 GAL	89681	33,047.42	
4	HOMO VD MILK	QTS	41068	8,213.60	
7	CHOC MILK	QTS	3111	757.95	
8	CHOC MILK HANDI-PK1/2	PTS	1207	78.20	
9	CHOC SHAKE	1/2 PTS	9153	851.25	
10	CHOC SKIM	1/2 GAL	1310	452.25	
12	BUTTERMILK	1/2 GAL	4071	1,500.03	
13	BUTTERMILK	QTS	8224	1,644.80	
15	GOLDEN DEL-GLASS	GAL	4088	2,657.20	
16	GOLDEN DEL	1/2 GAL	10426	3,599.96	
17	FORT SKIM	1/2 GAL	8355	2,884.95	
18	FORT SKIM	QTS	7839	1,502.53	
21	WHIPPING CREAM	1/2 PTS	3144	964.45	
22	HALFHALF	QTS	983	579.48	
23	HALFHALF	PTS	26925	8,034.36	
24	SOUR CREAM	16-OZ	3251	1,597.77	
25	SOUR CREAM	8-OZ	6843	1,692.83	
26	SOUR CREAM DIPS	8-OZ	1763	519.51	
28	ORANGE DRINK	1/2 GAL	995	217.99	
30	FRUIT PUNCH	1/2 GAL	652	142.86	
31	LEMONADE	1/2 GAL	1012	221.78	
32	GRAPE	1/2 GAL	249	54.59	
34	SOUR HALFHALF	PTS	3150	1,126.98	
35	TRIPLE WHIP	8-OZ	902	368.69	
36	YOGURT	1/2 PTS	2197	447.60	
46	WAKE UP	PTS	623	131.21	
47	NUMBER GAL IN		19690	2,953.50	
50	NUMBER GAL OUT		19864-	2,979.60	

\$ 93,353.16 \$ 118,627.06

FEDERAL TRADE COMMISSION  
 Docket No. 8866  
~~CONFIDENTIAL~~ EXHIBIT No. 128

990a

## THE BORDEN COMPANY

CAP TOTALS

H/E 5 29 1965

ITEM

PRODUCT

GAL

QUANTITY

PRICE

INVOICE AMT

RETAIL AMT

GAL

14777 6121

10,315.67

✓

GAL

11479 7371

8,461.01

✓

GAL

80117 3685

29,523.05

✓

QTS

37055 20

7,411.00

✓

QTS

2603 2437

634.21

✓

PTS

1936 6648

125.44

✓

GAL

1369 3453

472.60

✓

GAL

4910 3625

1,812.13

✓

QTS

8920 20

1,784.00

✓

GAL

3944 65

2,563.60

✓

GAL

9736 3453

3,361.69

✓

GAL

8643 3453

2,984.42

✓

QTS

8215 1175

1,574.65

✓

PTS

6260 1175

1,693.84

✓

QTS

1142 2515

673.17

✓

PTS

26450 2154

7,892.54

✓

16-OZ

3664 4915

1,800.85

✓

8-OZ

7915 2474

1,958.01

✓

8-OZ

1695 2474

499.40

✓

PTS

3770 2578

1,348.80

✓

8-OZ

1657 4081

677.42

✓

1/2 PTS

2594 2528

528.57

✓

PTS

1013 2108

213.40

✓

IN 15

18721 15

2,808.15

✓

OUT 15

20309-15

3,046.35

✓

\$ 88,071.32 ✓ \$ 112,289.56 ✓

FEDERAL TRADE COMMISSION

Product No. 48666-15

Exhibit No. 48666-15

12



991a

THE BORDEN COMPANY

RECAP TOTALS

W/E 5 22 1965

ITEM

PRODUCT

1	HORN VD MILK-GLASS	79	GAL
2	HORN VD MILK	1	GAL
3	HORN VD MILK	1 1/2	GAL
4	HORN VD MILK	1 1/2	QTS
7	COND-MILK	3	QTS
8	COND-MILK	1 1/2	PTS
10	COND SKIM	1 1/2	GAL
12	BUTTERMILK	1 1/2	GAL
13	BUTTERMILK	1 1/2	QTS
15	GOLDEN DEL-GLASS	75	GAL
16	CONDEN DEL	1 1/2	GAL
17	FORT SKIM	1 1/2	GAL
18	FORT SKIM	1 1/2	QTS
21	WHIPPING CREAM	1 1/2	PTS
22	HALF PALF	1	QTS
23	HALF PALF	1	PTS
24	SOUR CREAM	16-02	
25	SOUR CREAM	8-02	
26	SOUR CREAM DIPS	8-02	
34	SOUR HALF PALF	1	PTS
35	TRIPLE WHIP	8-02	
36	YOGURT	1 1/2	PTS
46	WAKE UP	1	
47	MURDER GAL IN	1	
50	MURDER GAL OUT	15	

QUANTITY

PRICE

INVOICE AMT

RETAIL AMT

14270	698.1	9,961.75	
10999	7371	8,107.20	
76163	3655	28,066.00	
36317	20	7,263.40	
2458	2427	598.84	
2035	6642	131.79	
1341	14773453	462.96	
4908	3685	1,808.52	
8889	20	1,777.80	
3834	65	2,524.60	
9318	3452	3,217.37	
8439	3453	2,913.93	
7648	1471	1,465.92	
4278	3685	1,312.40	
1116	5875	657.88	
23709	3484	7,074.57	
3049	495	1,498.53	
6996	1474	1,730.67	
4094	117-22-2304	945.20	
3146	1353	1,125.57	
1216	4039	497.12	
2675	2023	545.03	
835	2108	175.85	
18156	15	2,723.40	
19788	15	2,968.20	

\$ 83,618.10 \$ 106,568.11

7-821

886

992a

## THE BORDEN COMPANY

CAP TOTALS

W/E 5 15 1965

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL 14320	69.81	9,996.62	✓
2	HOMO VD MILK	GAL 10852	73.71	7,998.81	✓
3	HOMO VD MILK	1/2 GAL 75878	36.85	27,960.99	✓
4	HOMO VD MILK	QTS 36160	30	7,232.00	✓
7	CHOC MILK	QTS 33	24.37	631.80	✓
8	CHOC MILK HANDI-PK 1/2	PTS 2080	24.48	134.74	✓
10	CHOC SKIM	1/2 GAL 45	34.53	458.07	✓
12	BUTTER MILK	1/2 GAL 47	34.53	1,932.68	✓
13	BUTTER MILK	QTS 36	50	1,845.20	✓
15	GOLDEN DEL-GLASS	GAL 75	25	2,503.15	✓
16	GOLDEN DEL	1/2 GAL 45	34.53	3,228.45	✓
17	FORT SKIM	1/2 GAL 45	34.53	2,909.05	✓
18	FORT SKIM	QTS 25	14.17	1,532.53	✓
21	WHIPPING CREAM	PTS 40	30.62	1,195.48	✓
22	HALF & HALF	QTS 70	57.15	613.04	✓
23	HALF & HALF	PTS 24014	29.80	7,165.66	✓
24	SOUR CREAM	16-OZ 39	29.83	1,466.09	✓
25	SOUR CREAM	8-OZ 39	64.63	1,598.81	✓
26	SOUR CREAM DIPS	8-OZ 39	14.60	430.22	✓
34	SOUR HALF & HALF	PTS 44	30.46	1,089.73	✓
35	TRIPLE WHIP	8-OZ 35	671	274.27	✓
36	YOGURT	PTS 44	25.99	529.53	✓
46	WAKE UP	PTS 39	708	149.06	✓
47	NUMBER GAL IN	15	18170	2,725.50	✓
50	NUMBER GAL OUT	15	20053	3,007.95	✓

\$ 82,593.53 \$ 104,841.64 ✓

FEDERAL TRADE COMMISSION

DATE

10/15/65

993a

*Chicago & Suburbs*

THE BORDEN COMPANY

W/E 5 8 1965

RECAP TOTALS

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL 7 1/2	14739 1481	10,289.11	
2	HOMO VD MILK	GAL 6 1/2	11338 1371	8,357.14	
3	HOMO VD MILK	1/2 GAL 4 1/2	78614 3185	28,969.23	
4	HOMO VD MILK	QTS 3 1/2	37454 20	7,490.80	
7	CHOC MILK	QTS 3 1/2	2614 2481	636.86	
8	CHOC MILK HANDI-PK 1/2	PTS 3 1/2	2030 3648	131.48	
10	CHOC SKIM	1/2 GAL 1 1/2	1315 3453	453.96	
12	BUTTER MILK	1/2 GAL 4 1/2	5197 3185	1,915.03	
13	BUTTER MILK	QTS 3 1/2	9504 30	1,900.80	
15	GOLDEN DEL-GLASS	GAL 1 1/2	4096 65	2,662.40	
16	GOLDEN DEL	1/2 GAL 4 1/2	9690 3453	3,345.79	
17	FORT SKIM	1/2 GAL 4 1/2	8847 3453	3,054.76	
18	FORT SKIM	QTS 3 1/2	8574 1917	1,643.41	
21	WHIPPED CREAM	PTS 4 1/2	4213 3068	1,292.43	
22	HALF & HALF	QTS 1 1/2	1068 5415	629.56	
23	HALF & HALF	PTS 3 1/2	24838 1184	7,411.53	
24	SOUR CREAM	16-OZ 2 1/2	2974 4915	1,461.64	
25	SOUR CREAM	8-OZ 3 1/2	6579 3474	1,627.51	
26	SOUR CREAM DIPS	8-OZ 3 1/2	1479 3474	435.74	
34	SOUR HALF & HALF	PTS 4 1/2	2922 3618	1,045.34	
35	TRIPLE WHIP	8-OZ 5 1/2	2762 4138	1,052.26	
36	YOGURT	1/2 PTS 4 1/2	2700 1221	550.14	
46	WAKE UP	PTS 4 1/2	766 1108	161.35	
47	NUMBER GAL IN	18835 15		2,825.25	
50	NUMBER GAL OUT	19956-15		2,993.40	
				\$ 86,350.12	\$ 109,711.57

FEDERAL TRADE COMMISSION  
 Date: No. 886-6  
 Exhibit No. 10-22-1

N



Re: FTC v. A&P and Borden  
DOCKET # 8866  
COMPARISON OF PRIVATE LABEL PRICES QUOTED A&P  
TO THE 2-2-2 PRICING FORMULA, 1964-1965

	<u>Dairies</u> <u>Raw Milk</u> <u>Cost</u>	<u>Price Based</u> <u>on 2-2-2</u> <u>Formula*</u>	<u>Price</u> <u>Quoted</u> <u>A&amp;P</u>	<u>Excess of Quote</u> <u>Over 2-2-2</u> <u>Formula</u>
<u>Glen &amp; Mohawk</u> <u>Quote for Albany,</u> <u>New York (RAPX 62)</u> <u>(May 1964)</u>				
Quarts	\$ .10191	\$ .16191	\$ .16841	\$ .00650
Half-Gallons	.20382	.32382	.33532	.01150
Gallons	.40764	.64764	.66164	.01400
<u>Glen &amp; Mohawk</u> <u>Quote for New York</u> <u>(RAPX 63) (May 1964)</u>				
Quarts	.10191	.16191	.16471	.00280
Half-Gallons	.20382	.32382	.32792	.00410
Gallons	.40764	.64764	.64684	(.00080)
<u>Borden's Quote</u> <u>for New York</u> <u>(Sept. 1964)</u>				
Quarts	.1296	.1896	.1896	-
Half-Gallons	.2592	.3792	.3722	(.0070)
Gallons	.5184	.7584	.7334	(.0250)

\*See Tr. 1402-1404 and 6397-6417

RAPB7A

	Dairies Raw Milk Cost	Price Based on 2-2-2 Formula	Price Quoted. A&P	Excess of Quote Over 2-2-2 Formula
Glen & Mohawk Quote for Boston (RAPX 64) (Apr. 1965)				
Quarts	.108154	.168154	.16165	(.00650)
Half-Gallons	.21630	.33630	.33980	.00350
Gallons	.43260	.67260	.67060	(.00200)
Borden's First Quote for Chicago (CX 36) (8/13/65)				
Quarts	.09664	.15664	.1855	.0289
Half-Gallons	.1931	.3131	.3430	.0299
Gallons	.3862	.6262	.6860	.0598
Bowman's Chicago Quote (CX 50) (8/31/65)				
Quarts	.09864	.15864	.1696	.0110
Half-Gallons	.1971	.3171	.3136	(.0035)
Gallons	.3942	.6342	.6272	(.0070)
Final Borden Quote for Chicago (CX 62) (9/21/65)				
Quarts	.09664	.15664	.1705	.0139
Half-Gallons	.19314	.31314	.3110	(.0021)
Gallons	.38628	.62628	.6220	(.0042)

5413

22

HIDDEN CUSTOMER UNPAID DEBIT	CONTRACT CX 62	TESTIMONY OF STORE OPERATOR	STIPULATION OF 3/1/74*	EXAMINATION OF ROUTE BOOKS FOR NOV.-DEC. '69*	TESTIMONY ROUTE MAN	TYPE OF SERVICE INDICATED		COMPUTER PROGRAM CONSTANTS				
						LIMITED	FULL	DEL/STORE PER NO.	V. MIN. CASE	F. MIN. STOP	COLLECT PER NO.	
<u>SERVED ON STORE ROUTES</u>												
A&P - 12 Stores	x					x		27	K-5	K-9	0	
Burger's Food Market-Hammond		x					x	27	K-6	K-11	0	
Model Food Center-Hammond		x					x	27	K-6	K-11	0	
J. Tittle & Sons-Highland		x					x	27	K-6	K-11	0	
J. Tittle & Sons-Lake St.		x					x	27	K-6	K-11	0	
J. Tittle & Sons-Village Ct., Gary		x					x	27	K-6	K-11	0	
Wallie's Market-Hammond							x	27	K-6	K-11	0	
Wilco Food Center-Gary							x	27	K-6	K-11	0	
							x	27	K-5	K-9	0	
DeLocks			x					27	K-6	K-11	0	
DeLocks			x				x	27	K-7	K-11	0	
DeLocks			x				x	27	K-7	K-11	0	
Tiebels Restaurant			x				x	27	K-7	K-11	0	
K-Mart			x				x	27	K-7	K-11	0	
Stop & Shop			x			x		23	K-5	K-9	0	
Bantam			x				x	27	K-7	K-11	0	
Hi-Lo			x				x	27	K-6	K-11	27	
Stan's Grocery			x				x	27	K-7	K-11	27	
Jim's Marathon			x	x			x	14	K-6	K-11	14	
							x	14	K-7	K-11	0	
<u>SERVED ON MIXED CANTEN &amp; STORE ROUTE</u>												
A&P #358	x					x		27	K-5			
DeLocks							x					
<u>VALPARAISO DISTRIBUTOR</u>												
A&P #341	x											
J. Tittle & Sons-Valparaiso		x				x						

Special Program Per Testimony  
Special Program Per Testimony

\* Where both stipulation and route books contributed data, the facts as stated in the stipulation were applied.

COMPARISON OF BOWMAN (CX 50) AND  
BORDEN QUOTES (CX 62) (BORDEN ZONE 1)

QTS., 1/2 GALS. & GALS OF HOMOGENIZED MILK	Borden's Quote (CX 62) at \$4.32 per Cwt. (1)	Bowman's Quote (CX 50)	Bowman Lower By	IF BOWMAN WERE COMPELLED BY ITS UNION CONTRACT TO MAKE 6 DELIVERIES PER WEEK IN THE GARY-HAMMOND AREA OF INDIANA, BOWMAN STILL LOWER BY (4)
A. IN PAPER CONTAINERS VALUE OF 0.1% B.F.	\$2,521,294.96 25,345.75	\$2,514,530.13 --	\$ 6,764.83	(\$ 4,710.52)
COST ADJUSTED TO 3.5% B.F.	\$2,546,640.71	\$2,514,530.13	\$ 32,110.58	\$ 20,635.23
B IN GLASS GALLON CONTAINERS VALUE OF 0.1% B.F.	\$ 697,926.87 (2) 6,242.45	\$ 592,880.88 --	\$105,045.99	\$102,874.48
COST ADJUSTED TO 3.5% B.F.	\$ 704,169.32	\$ 592,880.88	\$111,288.44	\$109,116.93
TOTAL COST OF HOMOGENIZED MILK ADJUSTED TO 3.5% B.F.	\$3,250,810.03	\$3,107,411.01	\$143,399.02	\$129,752.16
8 OTHER DAIRY ITEMS ON WHICH BORDEN OFFERED PRIVATE LABEL	\$1,063,967.48	\$1,082,157.59	(\$ 18,190.11)	(\$ 21,099.43)
TOTAL 11 ITEMS ON WHICH BORDEN OFFERED PRIVATE LABEL ADJUSTED TO 3.5% B.F. (GLASS GALLONS ARE NOT INCLUDED)	\$3,610,608.19	\$3,596,687.72	\$ 13,920.47	(\$ 464.20)
10 ADDITIONAL ITEMS OFFERED BY BOWMAN IN PRIVATE OR BOWMAN LABEL AND BY BORDEN IN BORDEN LABEL ONLY	\$ 692,850.94 (3)	\$ 597,160.62	\$ 95,690.32	\$ 93,167.85
TOTAL - 22 FLUID MILK ITEMS	\$5,007,628.45	\$4,786,729.22	\$220,899.23	\$201,820.58
(1) CX 62 adjusted from \$4.29 per cwt. raw milk cost to \$4.32, the price in effect as of Sept. 21, 1965				

(2) Taken from Borden's September 14, 1965 quote (CX 56C)

(3) Based on Borden's September, 1965 prices to A&P. The ten items are sour cream (pints and 1/2 pints), pints of sour half & half, 1/2 pints of sour cream dip, 8 oz. Yogurt, 1/2 pints of milk shakes, 2% milk (offered by Borden in glass gallons and by Bowman in paper half gallons), half & half (offered by Borden in paper quarts and by Bowman in paper pints), and 2 specialty items offered by Borden (Wake-up and Triple Whip), which are comparable to 3 specialty items offered by Bowman (Boston Blend, Quick-Whip and Reddi-Whip).

(4) Cost for Gary-Hammond area of Indiana computed at Price shown in CX-50 for Areas 1, 2, 3 in Illinois for 6 day per week delivery. The figures in the last column are obtained by subtracting the corresponding "Annual Difference" figures in Column E on RA&PX 247B from the figures in the column entitled "Bowman Lower By" on this page.

Note: All data, except that shown in the extreme right hand column, is taken directly from RA&PX 100.

Detail for Recalculation of Bowman-Borden  
 Quotes if Bowman Was Required To Make 6  
 Day Delivery In Lake and Porter Counties, Ind.

PRODUCT	A Estimated Annual Vol. In Lake & Porter Co., Ind. (1)	B Bowman Areas 1,2,3 (6 day) (2)	C Price Area 4 (3 day) (3)	D Unit difference (4)	E Annual difference (5)
<u>Borden Private L. Items</u>					
Homo- gal.	129,272				
1/2 gal.	493,064				
qt.	97,431	\$.6272	\$.5984	\$.0288	\$ 3,723.03
Homo glass gallon		.3136	.2993	.0143	7,050.82
Sub Total Homo Milk	93,198	.1696	.1624	.0072	701.50
		.5952	.5719	.0233	11,475.35
2 1/2 gal.	101,781				2,171.51
Fort. Skim 1/2 gal.	21,216	.2944	.2801	.0143	13,046.66
" qt.	11,371	.3008	.2865	.0143	1,455.47
Buttermilk 1/2 gal.	23,504	.1632	.1560	.0072	303.39
" qt.	29,276	.3136	.2993	.0143	81.87
Choco. Milk qt.	10,400	.1472	.1400	.0072	336.11
Half & Half qt.	76,076	.2080	.2008	.0072	210.79
Whipping Cream	14,109	.2496	.2441	.0055	74.88
8 other items offered by Borden in Private Label		.2560	.2469	.0091	418.42
Total, 11 Private Label Items					128.39
Sour Cream - pint	16,991				2,909.32
" 1/2 pint	36,831	.4054	.3931	.0123	14,384.67
" 1/2 pint	32,965	.2080	.2039	.0041	225.98
" Cream dip - 1/2 pt.	10,174	.2976	.2907	.0069	151.01
Yogurt 8 oz.	13,430	.2800	.2709	.0091	227.46
Milk Shake 1/2 pt.	26,860	.1728	.1637	.0091	92.58
2 1/2 Milk, Glass gal.	49,448	.0768	.0753	.0015	122.21
1/2 1/2 -paper qt.	11,395	.5838	.5602	.0236	40.29
Boston Blend - pt.	7,326	.4092	.4882	.0790	1,414.21
Quick Whip Dispenser	3,358	.1856	.1771	.0085	125.35
Real Whip Dispenser	3,357	.3392	.3301	.0091	62.27
Sub Total - 11 items		.4550	.4459	.0091	30.56
					30.55
					2,522.47
Total Entire Product Line					19,078.65
Sources:					
(1) RA&PX 104, column 4					
(2) CX50 G					
(3) CX50 J					
(4) Column B - Column C					
(5) Column A x Column D					

998a

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

ESTABLISHED 1859

EXECUTIVE OFFICES

GRAYBAR BUILDING, 420 LEXINGTON AVENUE  
NEW YORK, N.Y. 10017

June 9, 1971

Mr. E. R. Bayma  
Purchasing Manager  
Chicago

Dear Mr. Bayma:

Following up the telephone conversations on the milk suppliers' proposals, we are forwarding with this letter copy of a suggested letter which you are to send to Borden Dairy & Services Division, Borden, Inc.

When you receive a satisfactory reply and forward to our attention, we shall be in a position to examine the offer.

We also understood from our conversations that the proposal covers a total of 201 stores out of a Divisional total of 260.

You are also at liberty to have the Spinney Run Farms Corporation present a full and complete offering for your consideration, covering the stores which you refer to.

The suggested letter which is attached will have to be amended, of course, as to dates. It is, also, a good idea to use the thoughts expressed in this letter in seeking the complete terms of other suppliers.

Yours very truly,

*J. J. Ryan*  
James J. Ryan

JJR:jc  
Att.

cc: Mr. H. B. Smith  
Mr. A. C. Molervey - Legal Department



999a

SUGGESTED LETTER

June 7, 1971

Re: Private Label ~~XXXXXXXXXX~~ MILK

*Accepted*  
(date) *6/24/71*

We wish to acknowledge your ~~letter~~ letter and terms of sale annexed.

Before proceeding further we wish the following to be clearly understood,

Any terms of sale you submit must be in writing, set forth complete details of your offer and only the terms precisely so set forth and accepted by this Division are to be deemed the operative terms. Any such terms must be made available to all competing customers of the same grade and quality products in affected markets in order for this Division to accept the offer you tender.

Your terms to this Division will not be acceptable if made in any respect on a "meeting competition" basis.

In this connection we have learned from recent experience <sup>(date)</sup> ~~that~~ the form of statement set forth in your ~~letter~~ letter regarding open availability of an offer to all competing customers was not previously intended by your organization to convey such undertaking and it is consequently now regarded by us as totally inadequate. Accordingly, we cannot proceed to consider your offer until this point is completely clarified in writing to our satisfaction.

R 28

Assuming you do so, and assuming further that a specific offer from you is finally determined by us to be acceptable, implementation of the offer by this Division will be on the express condition that satisfactory proof be presented to us that the terms so accepted are in fact being offered to all competing customers before the terms may actually be put into effect in our stores.

Kindly reply by letter. It is our feeling that it would be preferable that henceforth all communications between us relative to your offer be in writing.

Very truly yours,



June 15, 1971

Borden Dairy & Services Division  
Northern Division Borden, Inc.  
1821 South Kilbourn Avenue  
Chicago, Illinois 60623

Attention: Mr. W. C. Kershner  
Sales Manager

RE: Private Label Milk

Dear Mr. Kershner:

We wish to acknowledge your letter of April 20, 1971 and terms of sale annexed.

Before proceeding further we wish the following to be clearly understood.

Any terms of sale you submit must be in writing, set forth complete details of your offer and only the terms precisely so set forth and accepted by this Division are to be deemed the operative terms. Any such terms must be made available to all competing customers of the same grade and quality products in affected markets in order for this Division to accept the offer you tender.

Your terms to this Division will not be acceptable if made in any respect on a "meeting competition" basis.

In this connection we have learned from recent experience that the form of statement set forth in your letter of April 20, 1971 regarding operability of an offer to all competing customers was not previously intended by your organization to convey such undertaking and it is consequently now regarded by us as totally inadequate. Accordingly, we cannot proceed to consider your offer until this point is completely clarified in writing to our satisfaction.

Assuming you do so, and assuming further that a specific offer from you is finally determined by us to be acceptable, implementation of the offer by this Division will be on the express condition that satisfactory proof be presented to us that the terms so accepted are in fact being offered to all competing customers before the terms may actually be put into effect in our stores.

1002a

Borden - Page 2  
Re: Private Label Milk

Kindly reply by letter. It is our feeling that it would be preferable that henceforth all communications between us relative to your offer be in writing.

Very truly yours,

THE GREAT ATLANTIC & PACIFIC TEA CO., INC.

E. R. Schmidt  
Chicago Purchasing

ERS:elp

E 172

1003a

June 24, 1971

Borden Dairy & Services Division  
Northern Division Borden, Inc.  
1821 South Kilbourn Avenue  
Chicago, Illinois 60623

Attention: Mr. W. C. Kershner  
Sales Manager

Dear Mr. Kershner:

We would like you to enclose with your reply to  
Mr. Schmidt's letter of June 15, 1971 a cost  
justification analysis of your milk bid.

Very truly yours,

THE GREAT ATLANTIC & PACIFIC TEA CO., INC.

E. R. Bayma  
Purchasing Manager  
Chicago Division

ERB:olp

f 167

1004a

INTER-COMPANY CORRESPONDENCE

To:

Mr. J. J. Ryan  
 HEADQUARTERS

From:

Mr. E. R. Bayma  
 Purchasing Manager  
 CHICAGO

Date: July 2, 1971

Unit:

Unit:

Subject:

We are attaching herewith the following correspondence as requested of us in our phone conversation of yesterday.

1. Borden's letter of June 22nd to Elmer Schmidt. This communication increased the April 20th proposal by a .003 per point. This is so stated in paragraph #3.

It also, of course, affects our current paying price as of July 5.

2. Borden communication dated June 30, 1971 giving us the cost break-down of the .003 increase referred to in their letter of June 22nd.

3. A copy of our letter of June 24th to Borden requesting a cost justification analysis of their proposal to us.

Borden has indicated to us that they are unwilling to submit to us a cost justification analysis on their proposal to us because it is not in accordance with their policy to divulge their costing practices which they consider highly confidential. They indicated that if, however, similar cost justification analysis have been made to us by other dairies in support of their proposals they would be willing to reconsider and would need to know what format such cost justification should take.

*E. R. Bayma*  
 E. R. Bayma

ERS:clp  
 attachments

INTER-COMPANY CORRESPONDENCE

1005a

To:

MR. J. J. RYAN

From:

E. R. BAYMA

Date JULY 12, 1971

Unit:

HEADQUARTERS

Unit:

CHICAGO PURCH. MGR.

Subject:

In a phone conversation last week, our Legal Department asked for further clarification, in writing, of our conversation with the Borden Company as stated in our letter of July 2, 1971. We are giving you an additional copy of this letter to forward to them.

Mr. Kershner, Sales Manager, visited our office on Friday morning July 2, 1971 and brought in a cost breakdown dated June 30, 1971. This cost breakdown listed 5 items relative to the cost increase of .00305 per point.

In the conversation it was brought up by Mr. Kershner that Bordens was not willing to submit a cost justification analysis because they would have to disclose confidential costing practices.

He indicated that they had never done this in the past. Mr. Kershner stated this was not an outright "No" and that Bordens would appreciate receiving from us a format for a cost justification analysis.

Mr. Kershner was told that the bids were submitted to Headquarters and that we felt a cost justification analysis was requested in writing and that we should have a reply in writing.

ERS:np

*E. R. Bayma*

E. R. Bayma

H

181

1006a

BORDEN DAIRY & SERVICES DIVISION



July 29, 1971

Mr. E. R. Bayma, Purchasing Manager  
The Great A & P Tea Company  
2622 North Pulaski Road  
Chicago, Illinois 60639

Dear Mr. Bayma:

This letter is in response to your letter of June 24, 1971 requesting a cost justification analysis of the milk bid submitted to you on April 20, 1971. A cost justification analysis must of necessity involve the disclosure of confidential data regarding our operation. Regrettably, we must respectfully decline to furnish such information. It has never been our policy to disclose such information to any customer or competitor.

I would like to take this opportunity to reaffirm our desire to render A & P the service outlined in our proposal of April 20, 1971.

Sincerely,

R. C. Wagner  
Group Vice President



1821 S. WILBOURN AVENUE, CHICAGO, ILLINOIS 60623 • TELEPHONE (312) 277 6100

I

193

1007a

20,8253

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

ESTABLISHED 1830

EXECUTIVE OFFICES

GRAYBAR BUILDING, 420 LEXINGTON AVENUE  
NEW YORK, N.Y. 10017

April 14, 1971

TO: ALL DIVISIONAL PURCHASING MANAGERS

When you obtain offers for private label milk and dairy products in the future will you make sure that the following language is used as part of the request:

"We wish to emphasize that the Company does not accept offers on the basis of meeting competition except under extraordinary circumstances. Therefore, it is essential that any terms of sale which you may quote will be openly available to all competing customers in the marketing areas described."

HBS:DH

H. B. Smith

cc: Mr. William Corbus  
Mr. J. J. Ryan

*Handwritten:* Goodwill call

263,



1008a

THE KROGER CO. CHICAGO, ILLINOIS

CHICAGO, ILLINOIS

CHICAGO, ILLINOIS

CHICAGO, ILLINOIS

CHICAGO, ILLINOIS

July 29, 1938

Mr. A. L. Shough  
The Kroger Company  
1240 State Avenue  
Cincinnati, Ohio 45204

Dear Mr. Shough:

This opportunity to present to you a Kroger-Borden Fluid Milk Program for your Kroger markets in the Chicago-Kroger unit is sincerely appreciated.

We are confident that you will find in this presentation, the kind of product program that stimulates and motivates the attainment of increased sales volume and greater profit levels.

The products produced under the Kroger label will be manufactured and processed in accordance with the high quality standards established by Borden. These products, together with the Borden label milk products supplementing the Kroger line, will be processed and packaged in Borden's most modern production plant located at Woodstock, Illinois. This plant, which is the largest fully automated plant in the world handling a full and complete line of fluid milk items places Borden in the enviable position of being able to handle in the most efficient manner, your Chicago unit requirements. Our plant laboratory control program makes certain the pure and wholesome quality of the products produced and the strict adherence to the various local, State and Federal standards.

You will find attached a series of six (6) schedules which set forth the delivered net prices covering Kroger label and Borden label milk products, the terms and conditions in connection with this proposed program, price adjustment factors covering changes in raw milk costs and data in connection with promotional programming. This latter area establishes the proper coordination of merchandising, advertising and selling programs and concepts which are designed to produce the maximum results for Kroger. In this important field as related to fluid milk products, we have the expertise and experience and to this end we will coordinate all of the aspects to make certain that this program involving the sixty-four (64) Kroger stores in your Chicago unit, and Borden's strategically located plants and distribution locations will function smoothly as a unit and that mutually all parties will achieve the optimum possible from this program.

RBXIA



Mr. A. L. Gough

July 29, 1963

1009a

Certainly not to be overlooked is Borden's advertising program and proven consumer acceptance. Every day we are working. Borden's advertising is also working as a "silent salesman" in your stores, helping to create increased consumer interest and impulse sales of dairy products.

We also believe that it is important to give recognition to the location of the various Borden distribution points which provide for greater and more efficient distribution flexibility. In addition to facilities centrally located in Chicago, distribution branches are located at Rockford, Elgin and Libertyville, Illinois and at Hammond and South Bend, Indiana. This complex of locations provide more service flexibility than is obtainable from any other Chicago dealer. Also, our experience in serving your Rockford, Illinois stores with Kroger label products, we believe, is indicative of the job we can do for you on an overall unit basis. In this area sales have shown a significant growth, our standards and product controls have helped to generate satisfactory consumer acceptance of the Kroger label and, modestly, we are proud of our contribution.

A great deal more could be said in regard to our quality, consumer acceptance, merchandising, experience and personnel know-how, which would contribute to a successful Kroger-Borden Fluid Milk Program. However, we are sure that you are quite familiar with these plus factors.

We are grateful for your time and consideration of our proposal and request to become a part of your Kroger program. Please rest assured that your confidence in us will be returned many, many times by our people through their work, efforts, enthusiasm and cooperation.

Sincerely,

BORDEN, INC.  
Chicago Region

Orville P. Gosc  
General Manager

OPG/vw  
Encls.

1010a

Schedule No. 1

HORDON, INC.  
Chicago Region

VENDOR: HORDON, INC. 1000 W. 10TH STREET, CHICAGO, ILL. 60607  
 FIVE (5) DAY DELIVERY DELIVERY DELIVERY DELIVERY DELIVERY  
 KROGER LAMAR, PRODUCE  
 CHICAGO AREA (including Rockford and Peoria, Illinois)

Point Value	Product	Size and Type	Net Price
4	Hono V.D. Milk	Gallon - Paper	\$ .7656
2	Hono V.D. Milk	1/2 Gallon - Paper	.3828
1	Hono V.D. Milk	Quart - Paper	.2064
4	2%	Gallon - Paper	.7236
2	2%	1/2 Gallon - Paper	.3618
1	Chocolate Milk	Quart - Paper	.2408
2	Fortified Skim	1/2 Gallon - Paper	.3302
1	Fortified Skim	Quart - Paper	.1697
1	Buttermilk	Quart - Paper	.1734
2	Sour Cream	16 oz. Carton	.3784
1	Sour Cream	8 oz. Carton	.2038
1	Half & Half	Pint - Paper	.2289
1	Whipping Cream	1/2 Pint - Paper	.2292
1/2	Cottage Cheese	8 oz. Carton	.1720
1	Cottage Cheese	16 oz. Carton	.2691
2	Cottage Cheese	32 oz. Carton	.5124
1	Flavored Cottage Cheese	16 oz. Carton	.3012

W/1

1011a

VENDOR DELIVERY CONTRACT FOR OFFICIALS AND EMPLOYEES OF THE

FARM (S) OF THE DISTRICT OF COLUMBIA

FOR THE YEAR 1960

CHICAGO / 1960 (including Redford and Freeport, Illinois)

Point Value	Product	Size and Type	Net Price
4	Homo V.D. Milk	Gallon-Paper	\$ .7750
4	Homo V.D. Milk	Gallon-Glass	.7440
2	Homo V.D. Milk	1/2 Gallon-Paper	.3895
1	Homo V.D. Milk	Quart-Paper	.2099
4	2%	Gallon-Paper	.7370
2	2%	1/2 Gallon-Paper	.3685
1	Chocolate Milk	Quart-Paper	.2441
1/2	Chocolate Shake	1/2 Pint-Paper	.1089
2	Chocolate Skin	1/2 Gallon-Paper	.3697
2	Fortified Skin	1/2 Gallon-Paper	.3369
1	Fortified Skin	Quart-Paper	.1730
2	Buttermilk	1/2 Gallon-Paper	.3466
1	Buttermilk	Quart-Paper	.1767
2	Sour Cream	16 oz. Carton	.3851
1	Sour Cream	8 oz. Carton	.2072
1	Sour Half & Half	Pint-Paper	.3400
2	Half & Half	Quart-Paper	.4557
1	Half & Half	Pint-Paper	.2323
1	Whipping Cream	1/2 Pint-Paper	.2326
1/2	Cottage Cheese	8 oz. Carton	.1754
1	Cottage Cheese	16 oz. Carton	.2725
2	Cottage Cheese	32 oz. Carton	.5191
1	Flavored Cottage Cheese	16 oz. Carton	.3045
1	Dry Cheese	12 oz. Carton	.3371
1	Sour Cream Dips	8 oz. Carton	.2069
1	Yogurt	8 oz. Carton	.2170

15

A

1012a

Schedule 10a, 3

BORDERS, INC.,  
Chicago RegionVENDOR DELIVERIES TO STORES AND OFFICES, 1001 N. LAUREL STREET, CHICAGO, ILL.  
TIDWELL (A) MAY THROUGH 1960 - DELIVERY PROGRAM  
ROCKFORD & BURELPORT, ILLINOIS

Point Value	Product	Size & Type	Net Price	
			Kroger Label	Borden Label
4	Homé V.D. Milk	Gallon-Paper	\$.7325	\$.7325
4	Homé V.D. Milk	Gallon-Glass	-	.6825
2	Homé V.D. Milk	1/2 Gallon-Paper	.3675	.3675
1	Homé V.D. Milk	Quart-Paper	.1875	.1875
4	2%	Gallon-Paper	-	.7009
2	2%	1/2 Gallon-Paper	.3441	.3441
1	Chocolate Milk	Quart-Paper	.2213	.2213
1/2	Chocolate Shake	1/2 Pint-Paper	-	.1030
2	Chocolate Skim	Half Gal.-Paper	-	.3160
2	Fortified Skim	1/2 Gallon-Paper	.2596	.2596
1	Fortified Skim	Quart-Paper	-	.1350
2	Buttermilk	1/2 Gallon-Paper	-	.4150
1	Buttermilk	Quart-Paper	.2225	.2225
2	Sour Cream	16 oz. Carton	.4900	.4900
1	Sour Cream	8 oz. Carton	.2550	.2550
1	Sour Half & Half	Pint-Paper	-	.3710
2	Half & Half	Quart-Paper	-	.4400
1	Half & Half	Pint-Paper	.2200	.2200
1	Whipping Cream	1/2 Pint-Paper	.2550	.2550
1/2	Cottage Cheese	8 oz. Carton	.1670	.1670
1	Cottage Cheese	16 oz. Carton	.2730	.2730
2	Cottage Cheese	32 oz. Carton	.5460	.5460
1	Flavored Cottage Cheese	16 oz. Carton	.2930	.2930
1	Dry Cheese	12 oz. Carton	-	.2730
1	Sour Cream Dips	8 oz. Carton	-	.3000
1	Yogert	8 oz. Carton	-	.1925

14

3

## TERMS AND CONDITIONS

The unit selling prices shown on Milk Price Schedules No. 1, 2 and 3 relate to Flogey and Jordan label products delivered to your stores in accordance with the prevailing delivery methods applicable and subject to terms as here-in set forth.

(a) The unit selling prices for Class I products as set forth on Milk Price Schedules No. 1, 2 and 3 are based on the July 1968 net Class I superpool price of \$5.66 per cwt. for 3.5% butterfat milk, which net Class I superpool price recognizes the negotiated Class I superpool price of \$5.70 per cwt. less the zone allowance credit of \$.04 per cwt. under the superpool program. The unit selling prices for Class II products such as cottage cheese are based on the Class II buying price of \$4.18 per cwt. for 3.5% butterfat milk.

(b) The unit selling prices as set forth on Schedules No. 1, 2 and 3 will be subject monthly to automatic adjustment up or down in accordance with the changes occurring in the Class I and Class II announced milk prices under the Federal Order program or a negotiated Class I milk price in accordance with cost change factors set forth on Schedule No. 5.

(c) In the event the Class I milk price established under the provisions of the Federal Order in effect or a negotiated Class I milk price establishes a change in the presently recognized butterfat and skim milk values, the effect of such change will be automatically reflected where applicable in the unit prices as set forth on Schedules No. 1, 2 and 3.

(d) Deliveries will be made in accordance with the prevailing drop-delivery service in effect in the various markets.

- (1) Stores served on a 3-day per week basis will receive one delivery on Monday-Wednesday-Friday or Tuesday-Thursday-Saturday.
- (2) Stores served on a 5 or 6-day per week basis will receive one delivery per day.
- (3) The delivery time to each store will be handled in a manner to effectuate the most efficient delivery schedule.
- (4) Special deliveries shall not be made except in unusual instances, such as failure to perform in accordance with the advance order.
- (5) Deliveries at the store level will be made as directed, which considers the following drop-delivery considerations:

- (a) To the receiving door of the store  
(b) To a designated place on the receiving platform  
(c) To a refrigerated storage box that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked.
- (6) Empty milk cases and glass bottles shall be placed at a designated point for easy accessibility and pick-up by the delivery man.
- (c) Ordering of products.
- (1) Products will be pre-ordered, and advance order tickets for the following delivery shall be completed for presentation to the delivery man at the time of each delivery.
- (2) Advance order forms and delivery tickets will be supplied by Borden.
- (3) Borden personnel will assist in the formulation of this program and will work with Kroger personnel during the introductory period in the various phases of ordering and rotation of merchandise so that the program will achieve its ultimate sales goals and expectations.
- (f) Code dates.
- (1) Products will be clearly coded on the gable of the milk items and on the bottom of all bucket products.
- (2) All products are coded with an expiration date.
- (3) Code date requirements and expirations will be explained in the Chicago unit office and at local levels as requested.
- (g) Credit for product returns.
- (1) Credit for product returns shall only consider faulty containers at the time of delivery and faulty products remaining within the code dates.
- (h) In-Store Merchandising.
- (1) Borden's quarterly schedule of milk promotions will be made available.
- (2) Point-of-sale media will be furnished on approval at year office.
- (3) Program outline is set forth in detail under Schedule No. 6.



## TERMS AND CONDITIONS (Cont'd.)

## (i) Containers.

The unit selling prices shown on Milk Price Schedules No. 1, 2 and 3 are related to Borden's present unit purchase cost of such containers. Any changes in the purchase cost of such containers will be automatically reflected in the unit selling prices.

(j) Changes occurring in the cost of labor as a result of union contract changes, changes in the cost of materials and supplies and other applicable costs will be considered as the basis for an adjustment, up or down, to the unit selling prices set forth on Milk Price Schedules No. 1, 2 and 3.

(k) Invoices covering products purchased will be made on a weekly basis with payment due within ten (10) days from billing date.

(l) This program and the unit prices set forth on Milk Price Schedules No. 1, 2 and 3 is geared to serving the Kroger Chicago unit stores with their full requirements of fluid milk products packaged under Kroger and Borden labels.

## 1016a

BORDEN, INC.

Chicago Region

Schedule No. 5

POUR-AND-DRINK MILK  
COVERING RAW MILK COST CHANGES

## Class I Milk Products

If Class I Milk Cost Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Point	If Class I Milk Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Point
\$ .01	\$ .0002	\$ .24	\$ .0052
.02	.0004	.25	.0054
.03	.0007	.26	.0056
.04	.0009	.27	.0059
.05	.0010	.28	.0061
.06	.0013	.29	.0063
.07	.0015	.30	.0065
.08	.0017	.31	.0067
.09	.0019	.32	.0069
.10	.0021	.33	.0072
.11	.0024	.34	.0074
.12	.0026	.35	.0076
.13	.0028	.36	.0078
.14	.0030	.37	.0080
.15	.0033	.38	.0082
.16	.0035	.39	.0085
.17	.0037	.40	.0087
.18	.0039	.41	.0089
.19	.0041	.42	.0091
.20	.0043	.43	.0093
.21	.0045	.44	.0095
.22	.0048	.45	.0098
.23	.0050	.46	.0100

## Class II Cottage Cheese

If Class II Milk Cost Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Point
\$ .01	\$ .0005



1017a

Schedule No. 6

MORDEN, INC.  
Chicago RegionSCHEDULE OF MEAL PROMOTIONS  
3RD QUARTER 1968

Period	Item	Net In	Sugg. O/S
July 1 - 6	Quarts Buttermilk	\$ .16	\$ .19
	Half-Gallon Buttermilk	.32	.38
July 8 - 13	Elsie Shakes	.089	3/31
July 15 - 20	1 Lb. Cottage Cheese	.26	.33
July 22 - 27	Pints Half & Half	.24	.29
July 29-Aug. 3	Quarts Buttermilk	.16	.19
	Half-Gallon Buttermilk	.32	.38
Aug. 5 - 10	Yogurt	.181	.22
Aug. 12 - 17	Quarts Buttermilk	.16	.19
	Half-Gallon Buttermilk	.32	.38
Aug. 19 - 24	2 Lb. Cottage Cheese	.50	.69
Aug. 26 - 31	Pints Half & Half	.24	.29
Sept. 2 - 7	Half-Gallon Chocolate Drink	.32	.39
Sept. 9 - 14	Pints Coffee Whitener	.145	.19
Sept. 16 - 21	1 Lb. Cottage Cheese	.26	.33
Sept. 23 - 28	Half-Pints Whipping Cream	.24	.29
Sept. 30 - Oct. 5	Pints Half & Half	.24	.29

The above schedule is our third quarter promotional program.  
We will submit a quarterly program to your Chicago Unit Office  
for their approval covering each quarter.

151

1018a

# THE BORDEN COMPANY

CHICAGO REGION

1821 S. KILBOURN AVENUE

CHICAGO, ILLINOIS 60623

AREA CODE 312 277-6400

September 12, 1968

Mr. William H. Dyer, Jr., President  
Lucky Stores, Inc.  
1701 Marina Blvd.  
San Leandro, California 94577

Mr. Robert Margulies, President  
Eagle Food Centers, Inc.  
Route 67 and Knoxville Road  
Milan, Illinois 47031

Gentlemen:

We sincerely appreciate this opportunity to present our overall Food Club (or Lady Lee)/Borden Dairy products program for your Eagle Food Centers.

In the pages that follow we have outlined our complete sales programs and appreciate this opportunity to carefully review them with you. We feel quite certain you will be pleased with the tremendous savings available to your stores with your acceptance of this program.

In the proposal that follows, we have quoted prices for your label involving homogenized milk (gallons and half-gallons), 2% Low Fat Milk (gallons and half-gallons), Fortified Skim (half-gallons), Half & Half (pints), and Cottage Cheese (1 Lb.). We feel these items cover the tonnage products and are in keeping with your existing program.

We have designated Ralph Winters, General Sales Manager at our Rock Island, Illinois plant as your immediate sales and warehouse contact. Ralph will work closely with the writer in coordinating your dairy products program over your three (3) state operating area.

We could go into great detail regarding quality, consumer acceptance, production know-how, service, advertising, and product superiority, but, for the sake of brevity, we will not attempt to present the many Borden "plusses" which we feel would accrue to your fine stores. Let us say, however, that Borden milk products are well known and do enjoy outstanding consumer acceptance throughout the Midwest. We completely blanket your entire serving area with a network of strategically located Borden plants.

We wish to advise that our prices as proposed to you are proper under applicable law and will be available to all customers in the same class.

We thank you again, Bill and Bob, for the opportunity to present our

98  
RBX 5A

September 12, 1968

Mr. William H. Dyer, Jr., President

Mr. Robert Margulies, President

proposal. Your business would naturally mean a great deal to us. Rest assured, your confidence will be returned many, many times by our people through their work, enthusiasm, and complete cooperation.

Sincerely,

William K. Schools  
Vice President - Sales

WKS/vw  
Attachments

984

B

1020a

GENERAL TERMS AND CONDITIONS  
APPLICABLE TO ALL OF THE  
FOLLOWING PRICE SCHEDULES

---



TERMS AND CONDITIONS

The unit prices shown on the attached price schedules relate to Food Club and Borden Label products and are subject to terms and conditions as herein set forth.

- (A) The unit selling prices for Class I and Class II products as set forth on our price schedules are based on the July, 1968 net Class I prices as follows:

<u>Woodstock, Illinois (Chicago Federal Order)</u> \$5.70 Class I Super Pool Prices			
<u>Class I Total</u>	\$	<u>.065 Per Cwt. Fees &amp; Premiums</u>	Per Cwt.
		<u>5.765 Per Cwt. for 3.5% Milk</u>	
<u>Class II Total</u>	\$	<u>4.18 Class II Cost per Cwt.</u>	
		<u>.05 Per Cwt. Fees &amp; Premiums</u>	
		<u>4.23 Per Cwt. for 3.5% Milk</u>	
<u>Pekin, Illinois (Pekin Federal Order)</u>			
	\$	<u>5.72 Class I Super Pool Prices</u>	Per Cwt.
<u>Class I Total</u>	\$	<u>.08 Per Cwt. Fees &amp; Premiums</u>	
		<u>5.80 Per Cwt. for 3.5% Milk</u>	
<u>Class II Total</u>	\$	<u>4.28 Class II Cost per Cwt.</u>	
		<u>.12 Per Cwt. Fees &amp; Premiums</u>	
		<u>4.40 Per Cwt. for 3.5% Milk</u>	
<u>Rock Island, Illinois (Rock Island)</u>			
	\$	<u>5.63 Class I Super Pool Prices</u>	Per Cwt.
<u>Class I Total</u>	\$	<u>.13 Per Cwt. Fees &amp; Premiums</u>	
		<u>5.76 Per Cwt. for 3.5% Milk</u>	
<u>Class II Total</u>	\$	<u>4.28 Class II Cost per Cwt.</u>	
		<u>.12 Per Cwt. Fees &amp; Premiums</u>	
		<u>4.40 Per Cwt. for 3.5% Milk</u>	

The unit selling prices set forth on our price schedules will be subject monthly to automatic adjustments up or down in accordance with the changes occurring in the Class I and Class II announced milk prices under the Federal Order Program or, a negotiated Class I Super Pool Price, in accordance with cost change factors set forth on our Price Adjustment Schedule.

- (B) In the event the Class I milk price established under the provisions of the Federal Order in effect or a negotiated Class I milk price establishes a change in the presently recognized butterfat and skim milk values, the

effect of such change will be automatically reflected where applicable in the unit prices as set forth on our dock pick-up price schedule.

(C) Ordering of Products.

(1) Products will be pre-ordered at least two (2) days prior to the dock pick up date or delivery date where products are delivered by Borden.

(2) Borden personnel will assist in the formulation of this program and will work with Eagle personnel during the introductory period in the various phases of ordering and scheduling.

(D) The date and time of dock pick-up at Borden's docks must be established in advance to provide the most efficient material handling program for Borden and its customers. Where Borden delivers from its routes, the cooperation of store personnel is necessary to conserve driver and truck time.

(E) Code Dates.

(1) Products will be clearly coded on the gable of the milk items and on bottom of all bucket products.

(2) All products are coded with an expiration date.

(3) Code date requirements and expirations will be explained at local levels as requested.

(F) Credit for Product Returns.

(1) Credit for product returns shall only consider faulty containers at the time of dock delivery or at the time of delivery where deliveries are made by Borden route vehicles.

(G) Under this program private label purchases do not include the performance of advertising, store promotions, in-store material, product promotions, etc. on the part of Borden.

(H) Containers.

The unit selling prices shown on all price schedules are related to Borden's present unit purchase cost of containers. Any changes in the purchase



TERMS AND CONDITIONS (CONTINUED)

cost of containers will be automatically reflected in the unit selling prices.

(I) Changes occurring in the cost of labor as a result of union contract changes, changes in the cost of materials and supplies and other applicable costs will be considered as the basis for an adjustment, up or down, to the unit selling prices set forth on all price schedules attached hereto.

(J) Invoices covering products purchased will be made on a weekly basis with payment due within ten (10) days from billing date.

98%

## PRICE ADJUSTMENT SCHEDULE

## COVERING RAW MILK COST CHANGES

## Class I Milk Products

If Class I Milk Cost Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Point	If Class I Milk Increases or Decreased Per Cwt.	Selling Prices Will Increase or Decrease Per Poi
\$.01	\$.0002	\$.24	\$.0052
.02	.0004	.25	.0054
.03	.0007	.26	.0056
.04	.0009	.27	.0059
.05	.0010	.28	.0061
.06	.0013	.29	.0063
.07	.0015	.30	.0065
.08	.0017	.31	.0067
.09	.0019	.32	.0069
.10	.0021	.33	.0072
.11	.0024	.34	.0074
.12	.0026	.35	.0076
.13	.0028	.36	.0078
.14	.0030	.37	.0080
.15	.0033	.38	.0082
.16	.0035	.39	.0085
.17	.0037	.40	.0087
.18	.0039	.41	.0089
.19	.0041	.42	.0091
.20	.0043	.43	.0093
.21	.0045	.44	.0095
.22	.0048	.45	.0098
.23	.0050	.46	.0100

## Class II Cottage Cheese

If Class II Milk Cost Increases or Decreases Per Cwt.	Selling Prices Will Increase or Decrease Per Pound
\$.01	\$.0005

BORDEN DOCK PICK-UP PRICES

THE SELLING PRICES SET FORTH ON THE  
FOLLOWING DOCK PICK-UP PRICE SCHEDULES  
ARE EFFECTIVE WHERE PRODUCTS ARE PICKED  
UP IN TRAILER LOADS F.O.B. BORDEN'S DOCKS  
LOCATED AT WOODSTOCK, PEKIN AND ROCK ISLAND,  
ILLINOIS, SUBJECT TO THE TERMS AND CONDITIONS  
AS SET FORTH

---

## BORDEN DOCK PICK-UP PRICES \*

Product	Food Club	Size	Point Value	Woodstock, Ill. Dock Pick-Up Prices	Pekin, Ill. Dock Pick-Up Prices	Rock Island, Ill. Dock Pick-Up Prices
Homo Milk 3.3% B. F.		Gallon	4	.6464	.6496	.6464
Homo Milk 3.3% B. F.		1/2 Gal.	2	.3222	.3238	.3222
2%		Gallon	4	.5964	.5996	.5964
2%		1/2 Gal.	2	.2972	.2988	.2972
Fortified Skim		1/2 Gal.	2	.2483	.2499	.2483
Half & Half		Pint	1	.1847	.1851	.1847
Cottage Cheese		Lb.	1	.2204	.2289	.2289
"		2#	2	.4152	.4324	.4324
Borden Label				.716	.716	.716
Homo Milk-Glass 3.3% B. F.		Gallon	4	.6365	.6397	.6365
Homo Milk-Paper 3.3% B. F.		Gallon	4	.6564	.6596	.6564
Homo Milk 3.3% B. F.		1/2 Gal.	2	.3272	.3288	.3272
Homo Milk 3.3% B. F.		Quart	1	.1752	.1760	.1752
2%		Gallon	4	.6064	.6096	.6064
2%		1/2 Gal.	2	.3022	.3038	.3022
Chocolate Milk		Quart	1	.2037	.2045	.2037
Chocolate Skim		1/2 Gal.	2	.2882	.2898	.2882
Fortified Skim		1/2 Gal.	2	.2533	.2549	.2533
Fortified Skim		Quart	1	.1326	.1334	.1326
Buttermilk		1/2 Gal.	2	.2667	.2683	.2667
Buttermilk		Quart	1	.1363	.1371	.1363
Half & Half		Quart	2	.3657	.3665	.3657
Half & Half		Pint	1	.1872	.1876	.1872
Whipping Cream		1/2 Pint	1	.1961	.1963	.1961
Sour Cream		16 oz.	2	.3095	.3099	.3095
Sour Cream		8 oz.	1	.1693	.1695	.1693
Sour Half & Half		16 oz.	1	.2406	.2414	.2406
Sour Cream Dip		8 oz.	1	.1691	.1693	.1691
Cottage Cheese		8 oz.	1	.1267	.1310	.1310
Cottage Cheese		Lb.	1	.2229	.2314	.2314
Cottage Cheese		2 Lb.	2	.4204	.4374	.4374
Cottage Cheese-Flav.		Lb.	1	.2568	.2653	.2653
Dry Curd Cheese		12 oz.	1	.2683	.2747	.2747
Ob				.3165	.3127	.3127
The above prices are net and subject to no further discounts. These prices are subject to the attached terms and conditions.						
				.2646	.2646	.2646
				.1347	.1347	.1347
				.1647	.1647	.1647

BORDEN DROP DELIVERY PRICE SCHEDULES

- (1) ROCKFORD, LIBERTYVILLE, & ELGIN AREAS
- (2) ROCK ISLAND, MOLINE, EAST MOLINE,  
KEWANEE, STERLING AND ROCK FALLS,  
ILLINOIS AREAS

95

5



## BORDEN DROP DELIVERY PRICES \*

ROCKFORD, LIBERTYVILLE AND ELGIN AREAS

Product	Size	Point Value	Rockford Area (1) (3 Day Drop)	Elgin Area (2) (5 Day Drop)
Food Club			Present	Present
Homo Milk	3. 3% B. F.	4	7160 + .0067	7560 + .0067
Homo Milk	3. 3% B. F.	2	3580	3780
2%	Gallon	4	6740	7140
2%	1/2 Gal.	2	3370	3570
Fortified Skim	1/2 Gal.	2	3054	3254
Half & Half	Pint	1	2165	2265
Cottage Cheese	Lb.	1	2591	2691
"	2 lb.	2	4924	5124

Borden Label		1913	1914	1915	1916	1917	1918	1919	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941	1942	1943	1944	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050	2051	2052	2053	2054	2055	2056	2057	2058	2059	2060	2061	2062	2063	2064	2065	2066	2067	2068	2069	2070	2071	2072	2073	2074	2075	2076	2077	2078	2079	2080	2081	2082	2083	2084	2085	2086	2087	2088	2089	2090	2091	2092	2093	2094	2095	2096	2097	2098	2099	2100	2101	2102	2103	2104	2105	2106	2107	2108	2109	2110	2111	2112	2113	2114	2115	2116	2117	2118	2119	2120	2121	2122	2123	2124	2125	2126	2127	2128	2129	2130	2131	2132	2133	2134	2135	2136	2137	2138	2139	2140	2141	2142	2143	2144	2145	2146	2147	2148	2149	2150	2151	2152	2153	2154	2155	2156	2157	2158	2159	2160	2161	2162	2163	2164	2165	2166	2167	2168	2169	2170	2171	2172	2173	2174	2175	2176	2177	2178	2179	2180	2181	2182	2183	2184	2185	2186	2187	2188	2189	2190	2191	2192	2193	2194	2195	2196	2197	2198	2199	2200	2201	2202	2203	2204	2205	2206	2207	2208	2209	2210	2211	2212	2213	2214	2215	2216	2217	2218	2219	2220	2221	2222	2223	2224	2225	2226	2227	2228	2229	2230	2231	2232	2233	2234	2235	2236	2237	2238	2239	2240	2241	2242	2243	2244	2245	2246	2247	2248	2249	2250	2251	2252	2253	2254	2255	2256	2257	2258	2259	2260	2261	2262	2263	2264	2265	2266	2267	2268	2269	2270	2271	2272	2273	2274	2275	2276	2277	2278	2279	2280	2281	2282	2283	2284	2285	2286	2287	2288	2289	2290	2291	2292	2293	2294	2295	2296	2297	2298	2299	2300	2301	2302	2303	2304	2305	2306	2307	2308	2309	2310	2311	2312	2313	2314	2315	2316	2317	2318	2319	2320	2321	2322	2323	2324	2325	2326	2327	2328	2329	2330	2331	2332	2333	2334	2335	2336	2337	2338	2339	2340	2341	2342	2343	2344	2345	2346	2347	2348	2349	2350	2351	2352	2353	2354	2355	2356	2357	2358	2359	2360	2361	2362	2363	2364	2365	2366	2367	2368	2369	2370	2371	2372	2373	2374	2375	2376	2377	2378	2379	2380	2381	2382	2383	2384	2385	2386	2387	2388	2389	2390	2391	2392	2393	2394	2395	2396	2397	2398	2399	2400	2401	2402	2403	2404	2405	2406	2407	2408	2409	2410	2411	2412	2413	2414	2415	2416	2417	2418	2419	2420	2421	2422	2423	2424	2425	2426	2427	2428	2429	2430	2431	2432	2433	2434	2435	2436	2437	2438	2439	2440	2441	2442	2443	2444	2445	2446	2447	2448	2449	2450	2451	2452	2453	2454	2455	2456	2457	2458	2459	2460	2461	2462	2463	2464	2465	2466	2467	2468	2469	2470	2471	2472	2473	2474	2475	2476	2477	2478	2479	2480	2481	2482	2483	2484	2485	2486	2487	2488	2489	2490	2491	2492	2493	2494	2495	2496	2497	2498	2499	2500	2501	2502	2503	2504	2505	2506	2507	2508	2509	2510	2511	2512	2513	2514	2515	2516	2517	2518	2519	2520	2521	2522	2523	2524	2525	2526	2527	2528	2529	2530	2531	2532	2533	2534	2535	2536	2537	2538	2539	2540	2541	2542	2543	2544	2545	2546	2547	2548	2549	2550	2551	2552	2553	2554	2555	2556	2557	2558	2559	2560	2561	2562	2563	2564	2565	2566	2567	2568	2569	2570	2571	2572	2573	2574	2575	2576	2577	2578	2579	2580	2581	2582	2583	2584	2585	2586	2587	2588	2589	2590	2591	2592	2593	2594	2595	2596	2597	2598	2599	2600	2601	2602	2603	2604	2605	2606	2607	2608	2609	2610	2611	2612	2613	2614	2615	2616	2617	2618	2619	2620	2621	2622	2623	2624	2625	2626	2627	2628	2629	2630	2631	2632	2633	2634	2635	2636	2637	2638	2639	2640	2641	2642	2643	2644	2645	2646	2647	2648	2649	2650	2651	2652	2653	2654	2655	2656	2657	2658	2659	2660	2661	2662	2663	2664	2665	2666	2667	2668	2669	2670	2671	2672	2673	2674	2675	2676	2677	2678	2679	2680	2681	2682	2683	2684	2685	2686	2687	2688	2689	2690	2691	2692	2693	2694	2695	2696	2697	2698	2699	2700	2701	2702	2703	2704	2705	2706	2707	2708	2709	2710	2711	2712	2713	2714	2715	2716	2717	2718	2719	2720	2721	2722	2723	2724	2725	2726	2727	2728	2729	2730	2731	2732	2733	2734	2735	2736	2737	2738	2739	2740	2741	2742	2743	2744	2745	2746	2747	2748	2749	2750	2751	2752	2753	2754	2755	2756	2757	2758	2759	2760	2761	2762	2763	2764	2765	2766	2767	2768	2769	2770	2771	2772	2773	2774	2775	2776	2777	2778	2779	2780	2781	2782	2783	2784	2785	2786	2787	2788	2789	2790	2791	2792	2793	2794	2795	2796	2797	2798	2799	2800	2801	2802	2803	2804	2805	2806	2807	2808	2809	2810	2811	2812	2813	2814	2815	2816	2817	2818	2819	2820	2821	2822	2823	2824	2825	2826	2827	2828	2829	2830	2831	2832	2833	2834	2835	2836	2837	2838	2839	2840	2841	2842	2843	2844	2845	2846	2847	2848	2849	2850	2851	2852	2853	2854	2855	2856	2857	2858	2859	2860	2861	2862	2863	2864	2865	2866	2867	2868	2869	2870	2871	2872	2873	2874	2875	2876	2877	2878	2879	2880	2881	2882	2883	2884	2885	2886	2887	2888	2889	2890	2891	2892	2893	2894	2895	2896	2897	2898	2899	2900	2901	2902	2903	2904	2905	2906	2907	2908	2909	2910	2911	2912	2913	2914	2915	2916	2917	2918	2919	2920	2921	2922	2923	2924	2925	2926	2927	2928	2929	2930	2931	2932	2933	2934	2935	2936	2937	2938	2939	2940	2941	2942	2943	2944	2945	2946	2947	2948	2949	2950	2951	2952	2953	2954	2955	2956	2957	2958	2959	2960	2961	2962	2963	2964	2965	2966	2967	2968	2969	2970	2971	2972	2973	2974	2975	2976	2977	2978	2979	2980	2981	2982	2983	2984	2985	2986	2987	2988	2989	2990	2991	2992	2993	2994	2995	2996	2997	2998	2999	3000	3001	3002	3003	3004	3005	3006	3007	3008	3009	3010	3011	3012	3013	3014	3015	3016	3017	3018	3019	3020	3021	3022	3023	3024	3025	3026	3027	3028	3029	3030	3031	3032	3033	3034	3035	3036	3037	3038	3039	3040	3041	3042	3043	3044	3045	3046	3047	3048	3049	3050	3051	3052	3053	3054	3055	3056	3057	3058	3059	3060	3061	3062	3063	3064	3065	3066	3067	3068	3069	3070	3071	3072	3073	3074	3075	3076	3077	3078	3079	3080	3081	3082	3083	3084	3085	3086	3087	3088	3089	3090	3091	3092	3093	3094	3095	3096	3097	3098	3099	3100	3101	3102	3103	3104	3105	3106	3107	3108	3109	3110	3111	3112	3113	3114	3115	3116	3117	3118	3119	3120	3121	3122	3123	3124	3125	3126	3127	3128	3129	3130	3131	3132	3133	3134	3135	3136	3137	3138	3139	3140	3141	3142	3143	3144	3145	3146	3147	3148	3149	3150	3151	3152	3153	3154	3155	3156	3157	3158	3159	3160	3161	3162	3163	3164	3165	3166	3167	3168	3169	3170	3171	3172	3173	3174	3175	3176	3177	3178	3179	3180	3181	3182	3183	3184	3185	3186	3187	3188	3189	3190	3191	3192	3193	3194	3195	3196	3197	3198	3199	3200	3201	3202	3203	3204	3205	3206	3207	3208	3209	3210	3211	3212	3213	3214	3215	3216	3217	3218	3219	3220	3221	3222	3223	3224	3225	3226	3227	3228	3229	3230	3231	3232	3233	3234	3235	3236	3237	3238	3239	3240	3241	3242	3243	3244	3245	3246	3247	3248	3249	3250	3251	3252	3253	3254	3255	3256	3257	3258	3259	3260	3261	3262	3263	3264	3265	3266	3267	3268	3269	3270	3271	3272	3273	3274	3275	3276	3277	3278	3279	3280	3281	3282	3283	3284	3285	3286	3
--------------	--	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	---

\* The above prices are net and subject to no further discounts. These prices are subject to the terms and conditions as set forth.

Applicable to stores located in:

- (1) Rockford, Belvidere, Freeport, Oregon, DeKalb, Rochelle, Dixon.  
(2) Woodstock, Mundelein, Waukegan, Lindenhurst, Round Lake, Elgin,  
Carpentersville, St. Charles, Aurora, Crystal Lake, McHenry.

✓



Borden Delivered PricesRockford, Libertyville and Elgin Areas

The selling prices set forth represent delivered prices based on delivery to Eagle Food Center Stores in the above described areas by Borden routes and considers the following:

- (a) Delivery days per store are stipulated by the Union contracts in effect.
- (1) Rockford - 3 Day Service is allowed.
- (2) Libertyville and Elgin - 5 Day Service is mandatory.
- (b) Contract wage rates must be paid as negotiated
- (1) Rockford - Hourly Rate.
- (2) Libertyville and Elgin - Weekly Base Wage and Commission.
- (c) Union contract restrictions prohibits the removal of store business from the routes for delivery or pick-up by others.
- (d) Basic delivery methods reflect advanced pre-ordering by stores commensurate with the stipulated delivery frequency. All routes in these three areas are capable of maximum efficiencies from routes operated by Borden.
- (e) No special deliveries.
- (f) Area Involved: All stores within the boundaries of the following area:

North: Wisconsin-Illinois State Line.  
 East: Lake Michigan.  
 South: U. S. Route #30.  
 West: Illinois Route #26.

## (g) Stores Included:

Rockford - 17      Libertyville - 5

#1	#13	#35	#37	#10	#24
#2	#15	#38	#39	#11	#25
#3	#19	#40	#41	#12	#29
#6	#21	#42	#43	#13	#30
#10	#27	#44	#45	#14	
#12	#32	#46	#47	#15	

Elgin - 9

#4	#222
#7	#223
#9	#232
#17	#233
#28	#234
#36	#235

## BORDEN DROP DELIVERY PRICES \*

## THREE (3) DAY DROP

ROCK ISLAND, MOLINE, EAST MOLINE, KEWANEE  
STERLING AND ROCK FALLS, ILLINOIS AREA

Product	Size	Point Value	3 Day Drop Prices (1)	Present Prices
<u>Food Club</u>				
Homo Milk	3.3% B.F.	Gallon	4	.7566
Homo Milk	3.3% B.F.	1/2 Gal.	2	.3522 - 3578
2%		Gallon	4	.6624
2%		1/2 Gal.	2	.3312
Fortified Skim		1/2 Gal.	2	.2996
Half & Half		Pint	1	.2136
Cottage Cheese		Lb.	1	.2439
"		2#	2	462d
<u>Borden Label</u>				
Homo Milk-Glass	3.3% B.F.	Gallon	4	.7343
Homo Milk-Paper	3.3% B.F.	Gallon	4	.7766
Homo Milk	3.3% B.F.	1/2 Gal.	2	.3883
Homo Milk	3.3% B.F.	Quart	1	.2125
2%		Gallon	4	.7184
2%		1/2 Gal.	2	.3592
Chocolate Milk		Quart	1	.2350
Chocolate Skim		1/2 Gal.	2	.3391
Fortified Skim		1/2 Gal.	2	.3046
Fortified Skim		Quart	1	.1569
Buttermilk		1/2 Gal.	2	.3154
Buttermilk		Quart	1	.1606
Half & Half		Quart	2	.4251
Half & Half		Pint	1	.2161
Whipping Cream		1/2 Pint	1	.2164
Sour Cream		16 oz.	2	.3528
Sour Cream		8 oz.	1	.1910
Sour Half & Half		16 oz.	1	.3247
Sour Cream Dip		8 oz.	1	.1939
Cottage Cheese		8 oz.	1/2	.1385
Cottage Cheese		Lb.	1	.2464
Cottage Cheese		2 Lb.	2	.4674
Cottage Cheese		Lb.	1	.2803 271d
Cottage Cheese-Flav.		12 oz.	1	.2897 2527
Dry Curd Cheese		2#	1	3626

\* The above prices are net and subject to no further discounts. These prices are subject to the terms and conditions as set forth.

1984/10/27  
1984/10/27

N1

BORDEN DELIVERED PRICES

ROCK ISLAND, MOLINE, EAST MOLINE, KEWANEE,  
STERLING AND ROCK FALLS, ILLINOIS AREAS

The selling prices set forth represent delivered prices based on delivery to Eagle Food Center stores in the above described areas by Borden routes and considers the following:

- (a) Delivery days per store considers that maximum efficiency is to be maintained by utilizing advanced pre-order of store sales needs, a three day delivery frequency and the use of tractor-trailer delivery vehicles wherever possible.
- (b) Contract wage rates must be paid as negotiated.
- (c) Union contract restrictions prohibit the removal of store business from the routes for delivery or pick-up by others.

Rock Island - Hourly Rate

- (d) Area Involved: All stores within the boundaries of the following area:

North: U. S. Route No. 30  
East: Illinois Route No. 88  
South: Illinois Route No. 17  
West: Mississippi River

- (e) Stores Included:

#11	#118	#228
#13	#119	
#102	#120	
#112	#133	
#113	#141	
#114	#155	

496

N

SCHEDULES SHOWING DOCK PRICES AND  
ESTIMATED STORE DELIVERED COSTS USING EAGLE  
EMPLOYED CONTRACT CARRIER OR EAGLE'S OWN  
TRANSPORT EQUIPMENT

---

- (1) PLANO, JOLIET, MORRIS, PERU, AND PRINCETON AREAS
- (2) McCOMB, ILLINOIS AND BURLINGTON, IOWA AREAS
- (3) DAVENPORT, BETTENDORF, CLINTON, IOWA CITY,  
CEDAR RAPIDS, DUBUQUE, MARSHALLTOWN, CEDAR FALLS  
AND WATERLOO, IOWA AREAS
- (4) MADISON, MIDDLETON, SToughton, FT. ATKINSON, MONROE,  
WHITEWATER, JANESVILLE AND BELOIT, WISCONSIN AREAS

697



9/12/68

SCHEDULE SHOWING DOCK PRICES (F. O. B. WOODSTOCK, ILL.)  
AND

ESTIMATED STORE DELIVERED COSTS  
USING EAGLE EMPLOYED CONTRACT CARRIER  
OR EAGLE'S OWN TRANSPORT EQUIPMENT

Product	Food Club	Size	Point Value	Dock Price		Est. Store Delivered Cost (1)	Present Price (Plano, Ill.)
				F. O. B. Woodstock			
Homo Milk	3.3% B.F.	Gallon	4	\$ .6464	cc 60	.6900	\$ .7632
Homo Milk	3.3% B.F.	1/2 Gal.	2	.3222		.3440	.3816
2%		Gallon	4	.5964		.6400	.7212
2%		1/2 Gal.	2	.2972		.3190	.3606
Fortified Skim		1/2 Gal.	2	.2453		.2701	.3606
Half & Half		Pint	1	.1847		.1956	.2923
Cottage Cheese		Lb.	1	.2204		.2313	.2725
"		2 1/2	✓	.4154		.4372	
<u>Borden Label</u>							
Homo Milk-Glass	3.3% B.F.	Gallon	4	.6365	cc 60	.6801	.7482
Homo Milk-Paper	3.3% B.F.	Gallon	4	.6564		.7000	.7832
Homo Milk	3.3% B.F.	1/2 Gal.	2	.3272		.3490	.3916
Homo Milk	3.3% B.F.	Quart	1	.1752		.1861	.2098
2%		Gallon	4	.6064		.6500	.7412
2%		1/2 Gal.	2	.3022		.3240	.3706
Chocolate Milk		Quart	1	.2037		.2146	.2483
Chocolate Skim		1/2 Gal.	2	.2882		.3100	.3706
Fortified Skim		1/2 Gal.	2	.2533		.2751	.3706
Fortified Skim		Quart	1	.1326		.1435	.2028
Buttermilk		1/2 Gal.	2	.2667		.2885	.3916
Buttermilk		Quart	1	.1363		.1492	.2098
Half & Half		Quart	2	.3657		.3875	.5876
Half & Half		Pint	1	.1872		.1981	.2973
Whipping Cream		1/2 Pint	1	.1961		.2070	.3043
Sour Cream		16 oz.	2	.3095		.3313	.4931
Sour Cream		8 Oz.	1	.1693		.1802	.2518
Sour Half & Half		16 Oz.	1	.2406		.2515	.3498
Sour Cream Dip		8 Oz.	1	.1691		.1800	.2938
Cottage Cheese		8 Oz.	1/2	.1267		.1322	.1773
Cottage Cheese		Lb.	1	.2229		.2338	.2775
Cottage Cheese		2 Lb.	2	.4204		.4422	.5025
Cottage Cheese-Flav.		Lb.	1	.2568	2474	.2677	.2880
Dry Curd Cheese		12 Oz.	1	.2683	2313	.2792	.2368
				6420		2323	498
				5420		2327	498
				4330	#84	#227	#37

	PAGE
Gintert, Glenn W. (Wilco Food Center) .....	357a
Gose, Orville (Borden) .....	148a
Havemeyer, Robert G. (Case & Company, Inc.) .....	515a
Kristoff, Richard L. (Burger's Supermarket) .....	338a
Lasorso, Christopher (Mayfair Foods) .....	369a
Malone, Joseph (Borden)* .....	20a
Minard, Manley (Joseph Tittle & Sons) .....	382a
Minkler, Ralph R. (Borden) .....	55a
Pergler, Joseph J. (Borden) .....	432a
Peters, Paul (Model Food Center) .....	412a
Schmidt, Elmer (A&P) .....	224a
Smith, Herschel (A&P) .....	198a
Szczepaniak, John (Borden) .....	189a
Tarr, Gordon (Borden) .....	104a
Walker, Scott (FTC) .....	431a
White, John (A&P) .....	324a
(CHRONOLOGICAL)	
Malone, Joseph (Borden) .....	20a
Minkler, Ralph R. (Borden) .....	55a
Tarr, Gordon (Borden) .....	104a
Gose, Orville (Borden) .....	148a
Archer, Harry (Borden) .....	182a
Szczepaniak, John (Borden) .....	189a

\* The deposition testimony of Mr. Malone, who was deceased at the time of the hearing, is Commission Exhibit 262.

	PAGE
Smith, Herschel (A&P) .....	198a
Schmidt, Elmer (A&P) .....	224a
Bartels, Ira (A&P) .....	293a
White, John (A&P) .....	324a
Kristoff, Richard L. (Burger's Supermarket) .....	338a
Gintert, Glenn W. (Wilco Food Center) .....	357a
Lasorso, Christopher (Mayfair Foods) .....	369a
Minard, Manley (Joseph Tittle & Sons) .....	382a
Barney, Edward (Model Food Center) .....	396a
Peters, Paul (Model Food Center) .....	412a
Barnes, Robert (Wallies Market) .....	414a
Cox, James (Jim's Grocery) .....	419a
Bitting, R. John (FTC) .....	426a
Walker, Scott (FTC) .....	431a
Pergler, Joseph J. (Borden) .....	432a
Dean, Samuel E. (Dean Foods) .....	447a
Cannon, Frank T. (Bowman) .....	452a
Abrahms, Robert (Glen & Mohawk Milk Association) .....	496a
Havemeyer, Robert G. (Case & Company, Inc.) .....	515a
Dischner, Eugene (Borden) .....	540a
Corbus, William (A&P) .....	550a



## VOLUME II

## EXHIBITS\*

*Commission Exhibits*

	PAGE
CX 7	Borden letter, Minkler to Archer, Dec. 28, 1964 (Minkler 164) .....555a
CX 13J	Handwritten Borden worksheet, Feb. 9, 1965 (Malone 2619-A) .....566a
CX 14	Borden private label quote to A&P, Feb. 9, 1965 (Minkler 184) .....567a
CX 16	Internal Borden notes, Feb. 9, 1965 (Pentz 5591) .....572a
CX 18	Borden private label quote to A&P, May 25, 1965 (Minkler 193) .....574a
CX 19	Internal Borden memorandum, May 26, 1965 (Malone 2594) .....590a
CX 21	Borden private label quote to A&P, July 26, 1965 (Minkler 201) .....598a
CX 23	Borden memorandum submitted to A&P, 1965 (Minkler 206) .....619a
CX 24	Borden schedules submitted to A&P, Aug. 4, 1965 (Minkler 206) .....628a
CX 25A	Borden table submitted to A&P, Aug. 3, 1965 (Minkler 206) .....636a
CX 25B-E	Internal Borden memorandum, Aug. 6, 1965 (Malone 2594) .....637a

\* A large number of the exhibit pages received in evidence during the proceeding below are handwritten notes, memoranda and accounting worksheets and calculations. The legibility of these exhibits is unavoidably impaired. Following the description of each exhibit is a reference to the witness through whom and the transcript page at which the exhibit was introduced.

## PAGE

CX 26	Borden table submitted to A&P, Aug. 9, 1965 (Minkler 206) .....641a
CX 34	Internal A&P memorandum, Aug. 11, 1965 (Bartels 1871) .....642a
CX 36	Borden private label quote to A&P, Aug. 13, 1965 (Minkler 222) .....643a
CX 37	Borden calculation of private label savings to A&P, Aug. 13, 1965 (Minkler 222) .....677a
CX 42	Internal Borden memorandum, Aug. 16, 1965 (Minkler 222) .....683a
CX 50	Bowman private label quote to A&P, Aug. 31, 1965 (Schmidt 1712) .....687a
CX 53	Internal Borden notes, Sept. 1, 1965 (Pentz 5591) .....708a
CX 54	Handwritten Borden worksheets, Sept. 2, 1965 (Malone 2619-A) .....710a
CX 56	Borden private label quote to A&P, Sept. 14, 1965 (Minkler 246) .....712a
CX 58	Internal Borden memorandum, Sept. 17, 1965 (Malone 2594) .....736a
CX 62	Borden private label quote to A&P, Sept. 21, 1965 (Minkler 253) .....738a

## VOLUME III

CX 63	Internal Borden memorandum, Sept. 22, 1965 (Malone 2594) .....766a
CX 64	Borden letter, Minkler to Pentz, Sept. 23, 1965 (Minkler 283) .....770a

	PAGE
CX 65	A&P comparison of private label quotes, 1965 (Schmidt 1714) .....772a
CX 66	Internal A&P memorandum, Sept. 28, 1965 (Schmidt 1714) .....774a
CX 70	Internal A&P memorandum, Oct. 14, 1965 (Schmidt 1719) .....776a
CX 71	Internal Borden memorandum, Oct. 14, 1965 (Malone 2619-A) .....778a
CX 75A-J	Portion of Borden's final private label quote to A&P (Tarr 893, Schmidt 1721) .....780a
CX 75P-T	Borden letter, Minkler to Pentz, Dec. 7, 1965 (Minkler 297) .....790a
CX 75U	Internal Borden memorandum, Dec. 1965 (Minkler 304) .....795a
CX 75V-X	Internal Borden memorandum, 1965 (Minkler 304) .....796a
CX 75Z(1)-Z(3)	Borden letter, Minkler to Pentz, Jan. 3, 1966 (Minkler 300-01) .....799a
CX 79	Internal Borden memorandum, May 25, 1966 (Gose 1050) .....802a
CX 81	Internal Borden memorandum, May 27, 1966 (Pentz 5587) .....803a
CX 87	Handwritten Borden worksheets, June 19, 1966 (Malone 2619-A) .....804a
CX 90A-E	Internal Borden memorandum, June 29, 1966 (Malone 2594) .....807a
CX 90H	Internal Borden memorandum, Aug. 15, 1966 (Archer 1239) .....812a

	PAGE
CX 102	Borden letter, Gose to Schmidt, Mar. 13, 1967 (Schmidt 1724) .....813a
CX 103B-C	Borden letter, Gose to Schmidt, Mar. 21, 1967 (Gose 1065) .....816a
CX 103D-F	Borden letter, Gose to Schmidt, Mar. 21, 1967 (Schmidt 1727) .....818a
CX 105	Borden letter, Gose to Schmidt, Mar. 30, 1967 (Gose 1067) .....821a
CX 110	Internal Borden memorandum, Apr. 4, 1967 (Malone 2594) .....825a
CX 123	Borden discount schedule, Jan. 3, 1966 (Tarr 925) .....829a
CX 138	Borden discount schedule, Jan. 1, 1966 (Tarr 927) .....832a
CX 153D-E	Borden prices to A&P, 1965, Chicago-Calumet (Tarr 903) .....833a
CX 185	FTC Doc.—A&P purchases of private label items in private label and Borden label, Nov. 1965-Dec. 1968 (Bitting 747) .....835a
CX 206	Borden profit and loss statement, Jan. 1965-Aug. 1966 (Walker 5480) .....836a
CX 255	FTC Doc.—A&P's wholesale cost and retail prices for selected milk products, 1965-1968 (Bitting 807, 841) .....840a
CX 262	Malone deposition, Feb. 9-10, 1972 (1199, 1262) (see 20a-54a)
CX 263	A&P letter, Bartels to Smith, Oct. 1, 1965 (Smith 1376) .....841a
CX 290	FTC Doc.—Borden interest payments to Wilco (Bitting 5407) .....881a

*Respondent A&P Exhibits*

	PAGE
RA&PX 2 Borden letter, Tarr to Schmidt, Oct. 1, 1965 (Minkler 393) .....	882a
RA&PX 7 Excerpts from Tarr deposition, Dec. 1971 (Tarr 1005) .....	883a
RA&PX 16 Borden letter to A&P, Aug. 3, 1967 (Bartels 1930) .....	893a
RA&PX 17 Borden letter to A&P, Aug. 8, 1967 (Bartels 1930) .....	894a
RA&PX 18 Borden letter to A&P, Sept. 2, 1967 (Bartels 1933) .....	895a
RA&PX 40 Borden memorandum re Woodstock plant (Daube 7105) .....	897a

## VOLUME IV

RA&PX 100 A&P Doc.—Comparison of Borden and Bowman quotations (Havemeyer 6920) .....	942a
RA&PX 101 A&P Doc.—Geographic comparison of Borden and Bowman quotations (Havemeyer 6922) .....	943a
RA&PX 102 A&P Doc.—Indiana A&P stores in Borden and Bowman quotations (Havemeyer 6920) .....	946a
RA&PX 103 A&P Doc.—Raw milk price increase adjustment (Havemeyer 6920) .....	967a
RA&PX 104 A&P Doc.—Bowman prices in Indiana (Havemeyer 6920) .....	971a
RA&PX 105 A&P Doc.—Borden prices for items offered by Bowman (Havemeyer 6920) .....	975a

RA&PX 108 A&P Doc.—List price values of A&P milk line (Havemeyer 9834) .....	980a
RA&PX 137 A&P Doc.—Comparison of A&P private label prices and the 2-2-2 formula (Pilgrim 7349) .....	994a
RA&PX 185, A&P Doc.—Borden's Cost to Serve p. 11 A&P on Hammond Branch (Havemeyer 9808) .....	996a
RA&PX 246 A&P Doc.—Revised comparison of Borden and Bowman proposals (Havemeyer 9732) .....	996a-1
RA&PX 251 Borden-A&P correspondence re private label milk solicitation, 1971 (Stip. 9789) .....	998a
RA&PX 253 A&P letter re private label milk solicitation, 1971 (Stip. 9789) .....	1007a

*Respondent Borden Exhibits*

RBX 1 Borden proposal to Kroger, July 29, 1968 (Gose 1094) .....	1008a
RBX 5 Borden proposal to Eagle, Sept. 12, 1968 (Gose 1104) .....	1018a
RBX 22 Borden proposal to National Tea, Nov. 1968 (Dischner 7173) .....	1041a
RBX 23 Borden prices to K-Mart stores, Hammond, Ind., Nov. 1967 (Dischner 7176) .....	1062a

Initial Decision and Order of Administrative Law Judge, September 24, 1975 .....	1065a
----------------------------------------------------------------------------------	-------

Final Order and Opinion of Federal Trade Commission, April 29, 1976 .....	1193a
---------------------------------------------------------------------------	-------

PAGE

Opinion of Court of Appeals, June 21, 1977 .....1236a

Order Granting Petition for Writ of Certiorari,  
March 20, 1978 .....1266a

COMPARISON OF BORDEN (CX 60) AND  
BORDEN QUOTES (CX 62) (BORDEN ZONE 1)

QTS., 1/2 GALS. & GALS OF  
HOMOGENIZED MILK

Borden's Quote  
(CX 62) at \$4.32  
per Cwt. (1)

Bowman's Quote  
(CX 30)

Bowman  
Lower By

942a

A. IN PAPER CONTAINERS  
VALUE OF 0.1% B.F.

\$2,521,294.96  
25,345.75

\$2,514,530.13

6,764.83

COST ADJUSTED TO 3.5% B.F.

\$2,546,640.71

\$2,514,530.13

32,110.58

B. IN GLASS GALLON CONTAINERS  
VALUE OF 0.1% B.F.

\$ 697,926.87  
6,242.45

\$ 592,880.88

105,045.99

COST ADJUSTED TO 3.5% B.F.

\$ 704,169.32

\$ 592,880.85

111,238.44

TOTAL COST OF HOMOGENIZED

\$3,250,810.03

\$3,107.411.01

143,399.02

8 OTHER DAIRY ITEMS ON WHICH BORDEN  
OFFERED PRIVATE LABEL

\$1,063,967.48

\$1,082,157.59

(3 18,190.11)

TOTAL 11 ITEMS ON WHICH BORDEN OFFERED  
PRIVATE LABEL ADJUSTED TO 3.5% B.F.

(GLASS GALLONS ARE NOT INCLUDED)

\$3,510,608.19

\$3,596,687.72

13,920.47

10 ADDITIONAL ITEMS OFFERED BY  
BOWMAN IN PRIVATE OR BOWMAN LABEL  
AND BY BORDEN IN BORDEN LABEL ONLY

\$ 592,850.94<sup>(3)</sup>

\$ 597,160.62

; 95,690.32

TOTAL - 22 FLUID MILK ITEMS

\$5,007,628.45

\$4,786.729.22

220,899.23

(1) CX 62 adjusted from \$4.29 per cwt. raw milk cost to \$4.32, the price in effect as of Sept 21, 1965	\$5,007,628.45	\$4,786,729.22	\$220,899.23
----------------------------------------------------------------------------------------------------------	----------------	----------------	--------------

(2) Taken from Borden's September 14, 1965 quote (CX 56C)

(3) Based on Borden's September, 1965 prices to A&P. The ten items are sour cream (pints and 1/2 pints), pints of sour half & half, 1/2 pints of sour cream dip, 8 oz. Yogurt, 1/2 pints of milk shakes, 2% milk (offered by Borden in glass gallons and by Bowman in paper half gallons), half & half (offered by Borden in paper quarts and by Bowman in paper pints), and 2 specialty items offered by Borden (Wake-up and Triple Whip), which are comparable to ~~3 specialty items offered by Bowman~~ (Boston Blend, Quick-Whip and Reddi-Whip).

Specialty Items Offered By  
FEDERAL TRADE COMMISSION

Docket No. 87-6 Exhibit No. 100

In the Matter of 12-1

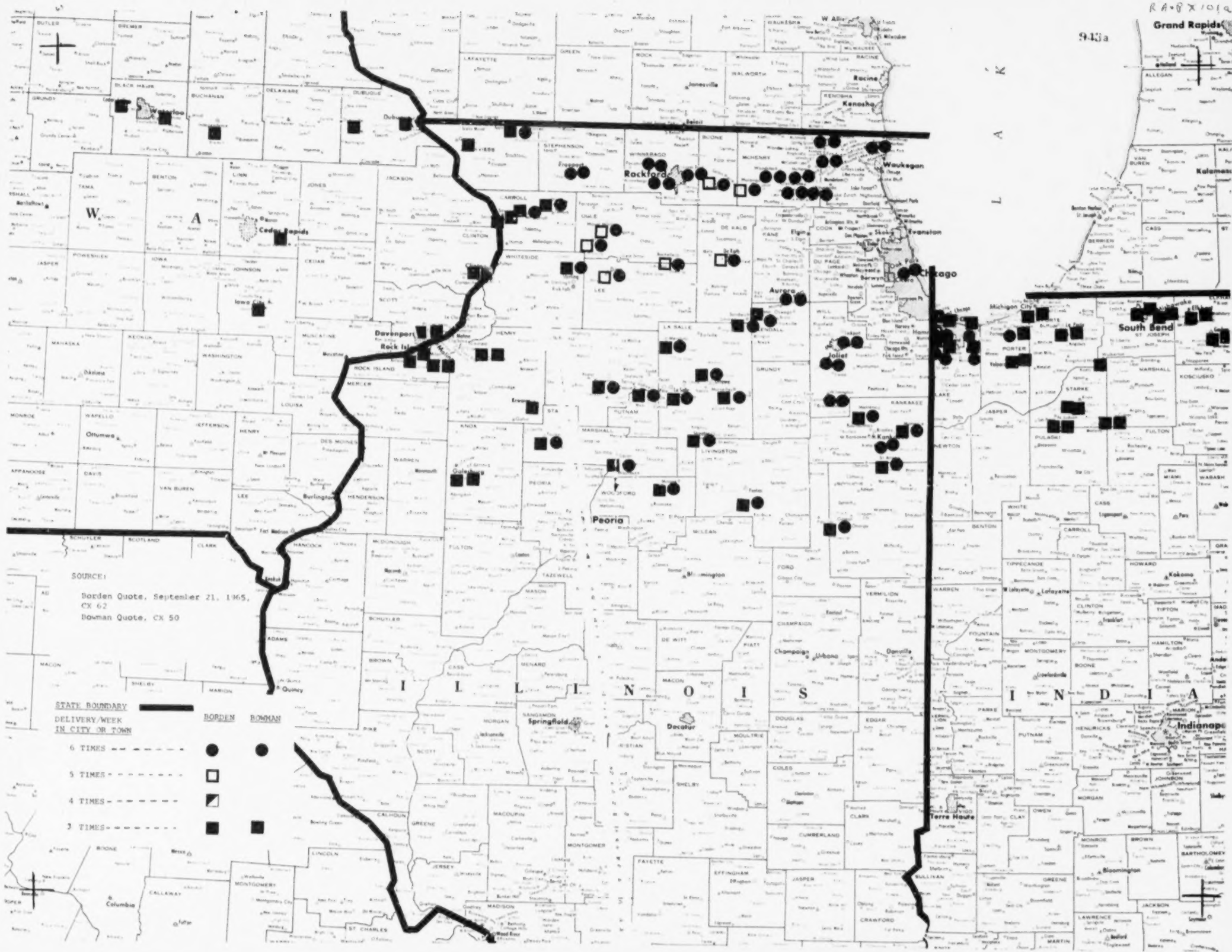
Date 5/24 Witness \_\_\_\_\_ Reporter ABC

STA



RA-8X101a  
Grand Rapids

9.43a



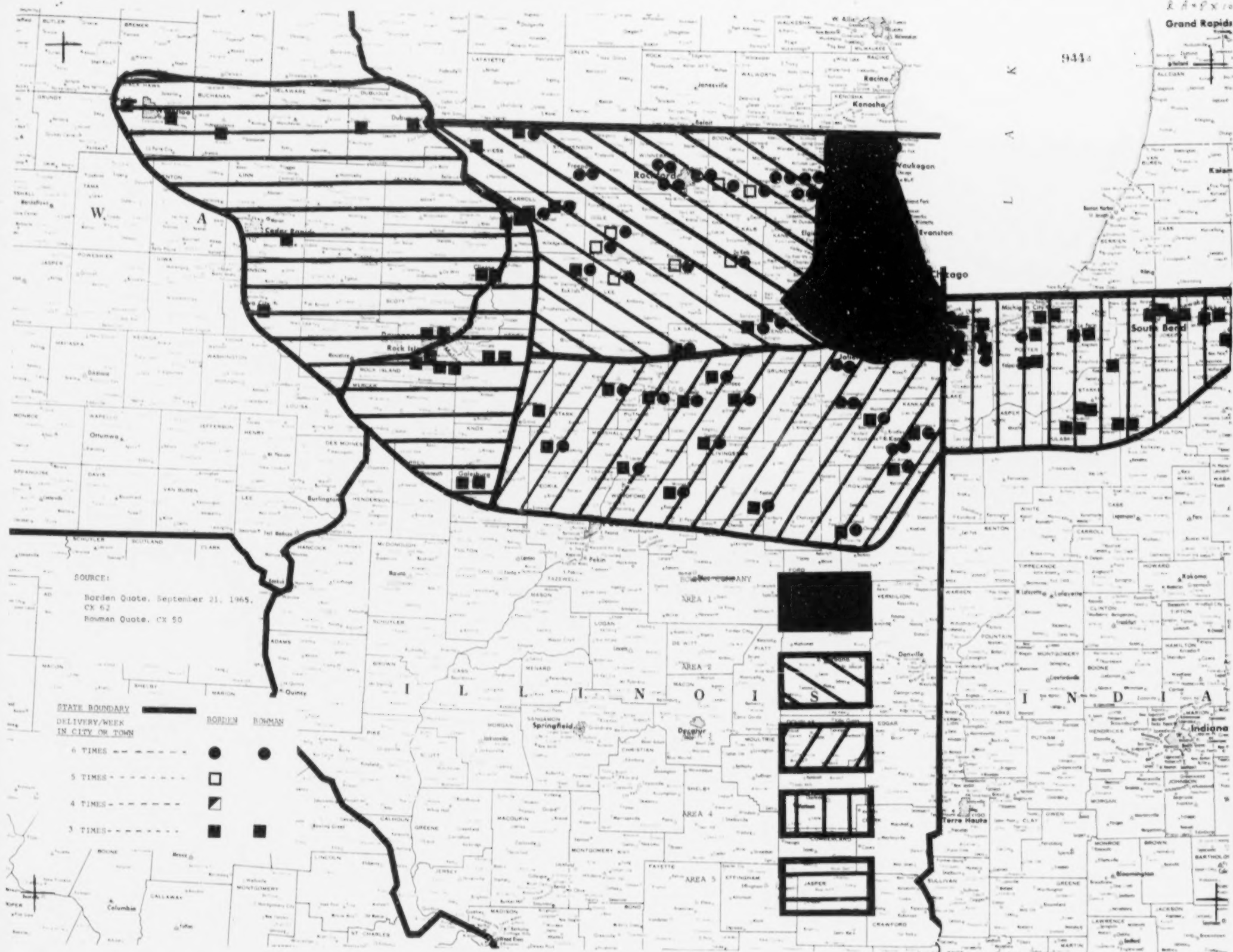
SOURCE:  
Borden Quote, September 21, 1965,  
CX 62  
Bowman Quote, CX 50

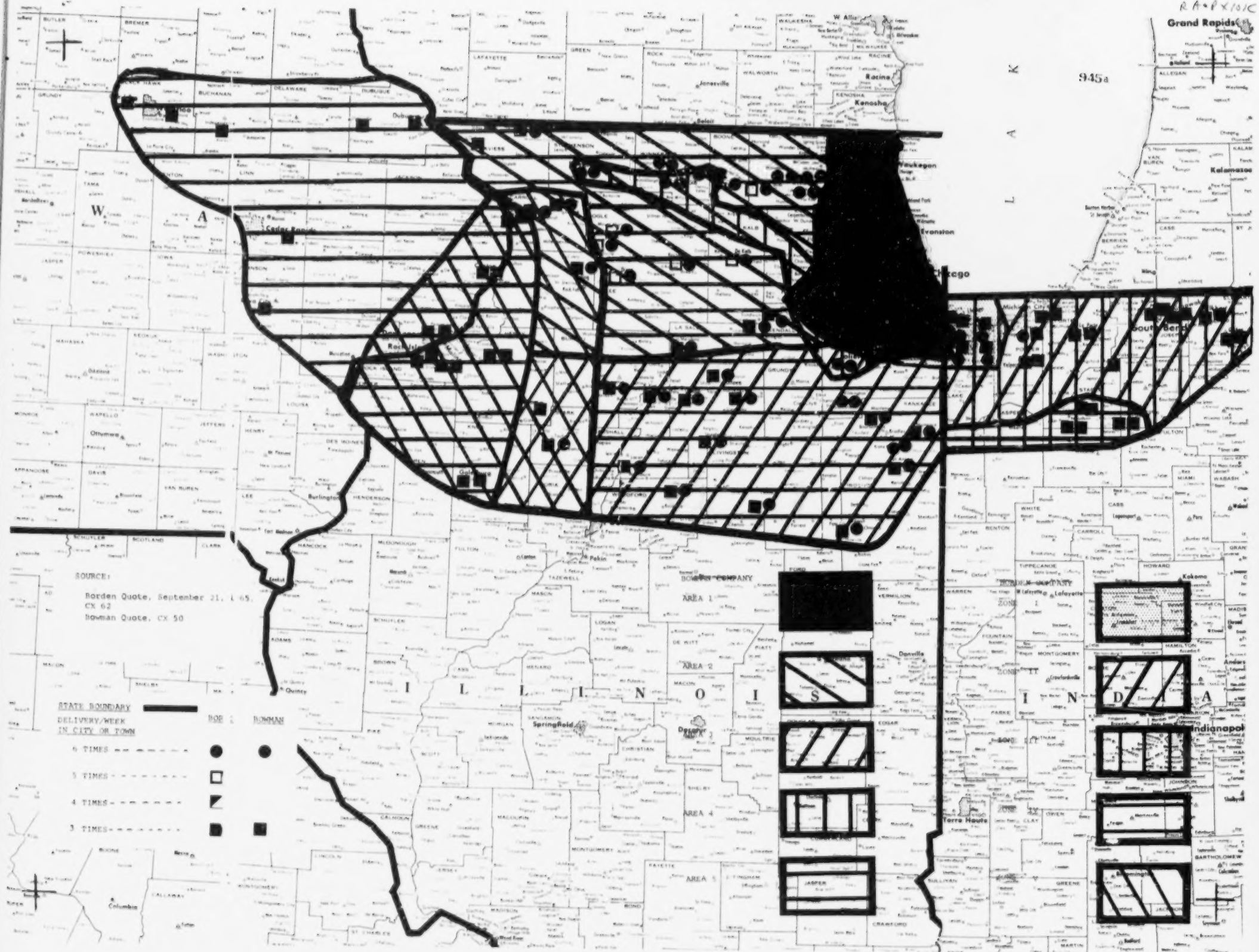
STATE BOUNDARY  
DELIVERY/WEEK  
IN CITY OR TOWN

BORDEN BOWMAN

- 6 TIMES - - - - - ●
- 5 TIMES - - - - - □
- 4 TIMES - - - - - ■
- 3 TIMES - - - - - ○







LOCATION OF INDIANA A&P STORES BY  
BOWMAN AND BORDEN PRICING AREAS

Stores in Indiana subject to Bowman Area 4 Prices per CX 50	Borden Zone in which Number of Stores' Volume is Included, CX 62			
	I	II	III	IV
Whiting	1			
Hammond	3			
Munster	1			
East Chicago	2			
Gary	6			
Portage	1			
Hobart	1			
Michigan City	1		1	
Valparaiso	1		1	
Chesterton	1		1	
North Judson	1			1
LaPorte	1		1	
Walkerton	1		1	
South Bend	8		7	
Mishawaka	1		1	
Elkhart	2		1	
Goshen	1		1	
Knox	1			1
Culver	<u>1</u>			<u>1</u>
Total Stores		15	15	3

CONCLUSION -- Volume Figures for Borden Zone II should Provide a  
Suitable Approximation of Volume in Indiana Part of Borden's  
Zone I.

A



937a

INDIANA STORES

CX 1

WEST

Whiting  
Hammond  
Munster  
E. Chicago  
Gary  
Michigan City  
Portage  
Hobart  
Valparaiso  
Chesterton

EAST

North Judson  
La Porte  
Walkerton  
Knox  
South Bend  
Culver  
Mishawaka  
Elkhart  
Goshen

18

17



B

12

September 21, 1965

## THE BORDEN COMPANY

General Quotation -- A &amp; P Private Label

(Related to Present Announced Superpool Class I Price of \$4.32 Per Cwt.)

\* Net Price for A & P Private Label Products  
by Type and Method of Delivery

Private Label Products	3-Day		4-Day		5-Day		6-Day	
	Per Week	Drop	Per Week	Drop	Per Week	Drop	Per Week	Drop
	Delivery		Delivery		Delivery		Delivery	
No V.D. Milk - Gallon Paper	.5848		.6048		.6148		.6248	
No V.D. Milk - 1/2 Gal. Paper	.2924		.3024		.3074		.3124	
No V.D. Milk - Quart Paper	.1612		.1662		.1687		.1712	
- 1/2 Gal. Paper	.2714		.2814		.2864		.2914	
Swiss Fortified Skim - 1/2 Gal. Paper	.2634		.2734		.2784		.2834	
Swiss Fortified Skim - Quart Paper	.1347		.1397		.1422		.1447	
1 & Half - Pint Paper	.2337		.2397		.2422		.2447	
Chocolate Milk - Quart Paper	.2057		.2107		.2132		.2157	
Termilk - 1/2 Gal. Paper	.2844		.2944		.2994		.3044	
Termilk - Quart Paper	.1467		.1517		.1542		.1567	
opping Cream - 1/2 Pint Paper	.2547		.2597		.2622		.2647	

Prices apply to stores located in the geographical area subject to the terms of the Chicago Superpool which are as follows:

## Stores Receiving 3-Day Per Week Delivery:

South Bend (6 stores), Mishawaka -  
Elkhart, Goshen, La Porte, Valparaiso,  
Walkerton and Michigan City.

## Stores Receiving 6-Day Per Week Delivery:

Chesterton, South Bend (1 store).

## Stores Receiving 4-Day and 5-Day Per Week Delivery:

None

- (1) Above net unit prices for A & P private label products are related to delivery conditions and co-operative program as set forth on the accompanying schedule.
- (2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of \$4.32 per cwt., indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

CHICAGO, CHICAGO SURROUND & CALUMET AREAS

LX 36F

Includes The Following Cities and Towns:

ILLINOIS

Chicago	Lake Bluff
Arlington Heights	Lake Forest
Barrington	Libertyville
Batavia	Maywood
Densenville	Midlothian
Deerfield	Ht. Prospect
Chicago Heights	Mundelein
Chicago Ridge	Naperville
Cicero	Niles
Des Plaines	Northridge
Dolton	Northbrook
Downers Grove	Oak Lawn
Dundee	Oak Park
Elgin	Palatine
Elmhurst	Park Ridge
Everest	Richton Park
Evergreen Park	Riverside
Franklin Park	Schaumburg
Glen Ellyn	Skokie
Glenview	St. Charles
Harvey	Summit
Highland Park	Villa Park
Highwood	Waukegan
Homewood	Western Springs
La Grange	Woodstock
	Wilmette
	Winnetka

INDIANA

East Chicago	Portage
Gary	Munster
Hammond	Whiting
Robart	

D



950a

(Zone No. 4)

September 21, 1965

The Borden CompanyGeneral Quotation - A & P Private Label

(Related to the Announced Class I Price Under Federal Order No. 30 of \$3.73 per Cwt.)

\* Net Price for A & P Private Label Products  
by Type and Method of Delivery

Private Label Products	3-Day		4-Day		5-Day		6-Day	
	Per Week	Drop	Per Week	Drop	Per Week	Drop	Per Week	Drop
	Delivery		Delivery		Delivery		Delivery	
Como V.D. Milk - Gal. Paper	.5360		.5580		.5680		.5780	
Como V.D. Milk - 1/2 Gal. Paper	.2690		.2790		.2840		.2890	
Como V.D. Milk - Quart Paper	.1495		.1545		.1570		.1595	
3 - 1/2 Gal. Paper	.2430		.2530		.2630		.2680	
Stamin Fortified Skim Milk - 1/2 Gal. Paper	.2400		.2500		.2550		.2600	
Stamin Fortified Skim Milk - Quart Paper	.1230		.1280		.1305		.1330	
Half & Half - Pint Paper	.2230		.2280		.2305		.2330	
Chocolate Milk - Quart Paper	.1940		.1990		.2015		.2040	
Buttermilk - 1/2 Gal. Paper	.2610		.2710		.2760		.2810	
Buttermilk - Quart Paper	.1350		.1400		.1425		.1450	
Whipping Cream - 1/2 Pint Paper	.2430		.2480		.2505		.2530	

Prices apply to stores located in the geographical area subject to the announced Class I milk prices under Federal Order No. 30, (which Class I milk prices are not subject to producer "superpool" payments) which stores are as follows:

Stores Receiving 3-Day Per Week Delivery:

Manteno	Momence	St. Annes	Gilman	La Salle
Marseilles	Ottawa	Streator	Pontiac	Princeton
Spring Valley	Sandwich	Plano	Lacon	Minonk
Culver	Knox	North Judson	Galena	Warren
Mendota				

Stores Receiving 4-Day Per Week Delivery:

None

Stores Receiving 5-Day Per Week Delivery:

Belvidere	Marengo	DeKalb
Rochelle	Polo	Mt. Morris
Dixon		

951a

VOLUME OF AAP FLUID MILK ITEMS - CHICAGO & SUBURBS -1965  
(SELECTED MONTHS)

11-2

	Points/ Unit P.7 Procedures Outline	5/8	5/15	5/22	5/29	Total for May	Total Points Col. 1x6 May	9/4	9/11	9/18	9/25	Total for September	Total Points Col. (1)x(12)	LINE NO.
Homo-Paper-Gallon	4	11,338	10,852	10,999	11,479	44,668	178,672	12,478	10,845	11,296	11,671	46,290	185,160	
- 1/2 Gallon	2	78,614	75,878	76,163	80,117	310,772	621,544	89,681	73,548	79,493	81,353	324,075	648,150	
- Quart	1	37,454	36,160	36,317	37,055	146,986	146,986	41,068	34,174	37,617	38,317	151,176	151,176	
Sub-Total						502,426						521,541		
2%-(Golden Del) 1/2 Gallon	2	9,690	9,350	9,318	9,736	38,094	76,188	10,426	8,937	9,456	9,428	38,247	76,494	
Port. Skim - 1/2 Gallon	2	8,847	8,425	8,439	8,643	34,354	68,708	8,355	7,299	7,894	8,021	31,569	63,138	
- Quart	1	8,574	7,995	7,648	8,215	32,432	32,432	7,839	6,997	7,234	7,641	29,711	29,711	
Buttermilk 1/2 Gallon	2	5,197	5,245	4,908	4,918	20,268	40,536	4,071	4,086	4,087	4,503	16,747	33,494	
- Quart	1	9,504	9,226	8,089	8,920	36,539	36,539	8,224	7,385	7,726	8,185	31,520	31,520	
Choco. Milk Quart	1	2,614	2,593	2,458	2,603	10,268	10,268	3,111	5,301	2,556	2,850	13,818	13,818	
Half & Half Pint	1	24,838	24,014	23,709	26,450	99,011	99,011	26,925	22,323	23,659	23,666	96,573	96,573	
Wh. Cream 1/2 Pint	1	4,213	3,897	4,278	6,260	18,648	18,648	3,144	2,517	2,850	2,770	11,281	11,281	
8 Item Sub-Total						289,614						269,466		
11 Item Sub-Total						792,040								
Homo-Glass-Gallon	4	14,739	14,320	14,270	14,777	58,106	232,424	15,602	13,628	14,664	14,512	58,406	233,624	15
Sub-Total Line 15 & Line 17						850,146								
2%-(Golden Del) Glass Gallon	4	4,096	3,851	3,884	3,944	15,775	63,100	4,088	3,564	3,802	3,725	15,179	60,716	19
Half & Half, Quart Paper	2	1,069	1,040	1,116	1,142	4,367	8,734	983	879	904	922	3,688	7,376	20
Sour Cream -Pt. (16 oz.)	2	2,974	2,983	3,049	3,664	12,670	25,340	3,251	2,727	2,630	2,624	11,232	22,464	21
" " 1/2 Pt. (8 oz.)	1	6,579	6,463	5,996	7,915	27,953	27,953	6,843	5,610	5,773	5,812	24,038	24,038	22
" Half & Half - Pt.	2	2,922	3,046	3,146	3,770	12,884	25,768	3,150	2,593	2,360	2,232	10,335	20,670	23
Sour Cream Dips-(8 oz.)	1	1,479	1,460	1,094	1,695	8,728	1,763	1,275	1,330	1,369	1,369	5,737	5,737	24
Yogurt	1	2,700	2,599	2,675	2,594	10,568	10,568	2,197	1,909	2,188	2,050	8,344	8,344	25
Shakes 1/2 Pint	1/2	-	-	-	-	-	-	9,153	6,664	14,547	7,535	37,899	9,475	26
Sub Total Line 19-26						92,945						116,452		
Triple Whip 8 oz	1	2,762	671	1,216	1,657	6,306	6,306	902	621	706	987	3,216	3,216	
Wake Up Pint	2	766	708	835	1,013	3,322	6,644	623	427	449	372	1,871	3,742	
Choco. Skim - 1/2 Gal	2	1,315	1,327	1,341	1,369	5,352	10,704	1,310	1,112	1,227	1,296	4,945	9,890	
Choco 1/2 Pint Handi Paks	1/2	2,030	2,080	2,035	1,936	8,081	2,020	1,207	1,005	1,281	1,328	4,821	1,205	

F

# SCHEDULE OF POINTS USED TO COMPUTE PRICES

	Point Value
All Gallons Milk Products	4
All Half Gals. "	2
All Quarts "	1
1/2 Pints Whipping Cream	1
Pints Half & Half	1
Quarts Half & Half	2
8 oz. Sour Cream	1
16 oz. Sour Cream	2
Pint (16 oz.) Sour Half & Half	1
1/2 Pint (8 oz.) Sr. "	1/2
8 oz. Sour Cream Dips	1
1/2 Pint Elsie Shakes	1/4
7 oz. Triple Whip	1
8 oz. Yogurt	1
Pint Coffee Whitener	1
2 Lb. Cottage Cheese	2
1 Lb. Cottage Cheese	1
8 oz. Cottage Cheese	1/2
12 oz. Cottage Cheese	1
Quart Egg Nog	1

\*These products are not subject to market fluctuations of Class 1 Milk and are not on Class 1 formula pricing.

221 67

Chicago  
Suburban

953a

636-470  
10-6-65

THE BORDEN COMPANY  
CENTRAL DIVISION  
1821 S. KILBOURN  
CHICAGO ILLINOIS 60623

RECAP TOTALS

W/E 9 25 1965

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	14512 GAL	.6987	10,130.73	
2	HOMO VD MILK	11671 GAL	.7371	8,602.53	
3	HOMO VD MILK	1/2 GAL	.3615	29,978.51	
4	HOMO VD MILK	QTS	.2000	7,663.40	
7	CHOC MILK	QTS	.2437	694.39	
8	CHOC MILK HANDI-PK1/2	PTS	.0648	86.04	
9	CHOC SHAKE	1/2 PTS	.0930	700.75	
10	CHOC SKIM	1/2 GAL	.2000	447.39	
12	BUTTERMILK	1/2 GAL	.3685	1,659.25	
13	BUTTERMILK	QTS	.2000	1,637.00	
15	GOLDEN DEL-GLASS	3725 GAL	.6500	2,421.25	
16	GOLDEN DEL	1/2 GAL	.3453	3,255.33	
17	FORT SKIM	1/2 GAL	.3453	2,769.54	
18	FORT SKIM	QTS	.1917	1,464.67	
21	WHIPPING CREAM	1/2 PTS	.3068	849.75	
22	HALF&HALF	QTS	.5995	543.48	
23	HALF&HALF	PTS	.2984	7,061.82	
24	SOUR CREAM	16-OZ	.4915	1,289.59	
25	SOUR CREAM	8-OZ	.2474	1,437.74	
X26	SOUR CREAM DIPS	8-OZ	.2947	403.39	
X28	ORANGE DRINK	1/2 GAL	.2581	62.72	
X30	FRUIT PUNCH	1/2 GAL	.2581	33.55	
X31	LEMONADE	1/2 GAL	.2581	14.96	
34	SOUR HALF&HALF	PTS	.3571	798.49	
35	TRIPLE WHIP	8-OZ	.2038	403.42	
36	YOGURT	1/2 PTS	.2038	417.71	
46	WAKE UP	PTS	.2198	78.31	
47	NUMBER GAL IN		.15	2,735.55	
50	NUMBER GAL OUT		.15	2,958.00	

\$ 84,460.80 \$ 107,065.93

21

0000-0

H



954a

6353512  
930

THE BORDEN COMPANY  
CENTRAL DIVISION  
1821 S. KILBOURN  
CHICAGO ILLINOIS 60623

Chicago &amp; Suburbs

RECAP TOTALS

W/E 9 18 1965

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL
1	HOMO VD MILK-GLASS	14664	6981	10,236.82	79
2	HOMO VD MILK	11296	7371	8,326.16	89
3	HOMO VD MILK	79493	3685	29,293.08	47
4	HOMO VD MILK	37617	20	7,523.40	26
7	CHOC MILK	2556	2437	622.71	33
8	CHOC MILK HANDI-PK 1 1/2	1281	0648	82.97	0875
9	CHOC SHAKE	14547	08 SPEC	1,163.76	125
10	CHOC SKIM	1227	3453	423.55	45
12	BUTTERMILK	4087	3685	1,505.99	47
13	BUTTERMILK	7726	20	1,545.20	26
15	GOLDEN DEL-GLASS	3802	65	2,471.30	75
16	GOLDEN DEL	9456	3453	3,265.05	45
17	FORT SKIM	7894	3453	2,725.69	45
18	FORT SKIM	7234	1917	1,386.55	25
21	WHIPPING CREAM	2850	3068	874.28	40
22	HALF&HALF	904	5895	532.88	78
23	HALF&HALF	23659	2984	7,059.73	39
24	SOUR CREAM	2630	4915	1,292.51	69
25	SOUR CREAM	5773	2474	1,428.11	39
26	SOUR CREAM DIPS	1330	2947	391.89	39
28	ORANGE DRINK	5	2581	1.29	35
31	LEMONADE	3	2581	.78	35
34	SOUR HALF&HALF	2360	3578	844.36	49
35	TRIPLE WHIP	706	4039	288.57	55
36	YOGURT	2188	2038	445.74	29
46	WAKE UP	449	2108	94.52	29
47	NUMBER GAL IN	18466	.15	2,769.90	
50	NUMBER GAL OUT	19308	(N)	2,896.20	
				\$ 83,700.59	\$ 106,346.17

I

955a

34650  
4-6-61

THE BORDEN COMPANY  
CENTRAL DIVISION  
1821 S. KILBOURN  
CHICAGO ILLINOIS 60623

CHICAGO &amp; SUBURBS

RECAP TOTALS

W/E 9 11 1965

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HONG-VD-MILK-GLASS	13628	.6981	9,513.59	.7900
2	HOMO VD MILK	10845	.7371	7,993.76	.8900
3	HOMO VD MILK	73548	.3685	27,102.31	.4700
4	HOMO VD MILK	34174	.2000	6,834.80	.2100
7	CHOC MILK	5301	.2000	1,060.20	.3300
8	CHOC MILK HANDI-PK1/2	1005	.0649	65.11	.0975
9	CHOC SHAKE	6664	.093	619.76	.1250
10	CHOC SKIM	1112	.3453	383.82	.4500
12	BUTTERMILK	4086	.3685	1,505.60	.4700
13	BUTTERMILK	7385	.2000	1,477.00	.2600
15	GOLDEN DEL-GLASS	3564	.6500	2,316.60	.7500
16	GOLDEN DEL	8937	.3453	3,085.81	.4500
17	FORT SKIM	7299	.3453	2,520.22	.4500
18	FORT SKIM	6997	.1917	1,341.17	.2500
21	WHIPPING CREAM	2517	.3068	772.12	.4000
22	HALF&HALF	879	.5895	518.17	.7800
23	HALF&HALF	22323	.2984	6,661.03	.3900
24	SOUR CREAM	2727	.4915	1,340.23	.6400
25	SOUR CREAM	5610	.2474	1,387.78	.3900
26	SOUR CREAM DIPS	1275	.2447	375.77	.3900
28	ORANGE DRINK	20	.2581	5.16	.3500
30	FRUIT PUNCH	6	.2581	1.55	.3500
31	LEMONADE	11	.2581	2.83	.3500
34	SOUR HALF&HALF	2593	.3578	927.65	.4900
35	TRIPLE WHIP	621	.4089	253.83	.5500
36	YOGURT	1909	.2038	388.94	.2900
46	WAKE UP	427	.2108	89.89	.2900
47	NUMBER GAL IN	17192	.15	2,578.80	.15
50	NUMBER GAL OUT	18258-	(.15)	2,738.70-	.15
				\$ 78,384.80	\$ 99,718.29



Chicago  
Suburban

956a

THE BORDEN COMPANY  
CENTRAL DIVISION  
1821 S. KILBOURN  
CHICAGO ILLINOIS 60623

RECAP TOTALS

W/E 9 4 1965

ITEM

PRODUCT

1 HOMC VD MILK-GLASS GAL  
2 HOMC VD MILK GAL  
3 HOMC VD MILK 1/2 GAL  
4 HOMC VD MILK QTS  
7 CHOC MILK QTS  
8 CHOC MILK HANDI-PK 1/2 PTS  
9 CHOC SHAKE 1/2 PTS  
10 CHOC SKIM 1/2 GAL  
12 BUTTERMILK 1/2 GAL  
13 BUTTERMILK 1/2 GAL  
15 GOLDEN DEL-GLASS QTS  
16 GOLDEN DEL GAL  
17 FORT SKIM 1/2 GAL  
18 FORT SKIM 1/2 GAL  
21 WHIPPING CREAM 1/2 QTS  
22 HALF&HALF QTS  
23 HALF&HALF PTS  
24 SOUR CREAM 16-OZ  
25 SOUR CREAM 8-OZ  
26 SOUR CREAM DIPS 8-OZ  
28 ORANGE DRINK 1/2 GAL  
30 FRUIT PUNCH 1/2 GAL  
31 LEMONADE 1/2 GAL  
32 GRAPE 1/2 GAL  
34 SOUR HALF&HALF PTS  
35 TRIPLE WHIP 8-OZ  
36 YOGURT 1/2 PTS  
46 WAKE UP PTS  
47 NUMBER GAL IN  
50 NUMBER GAL OUT

QUANTITY

PRICE

INVOICE AMT

RETAIL AMT

15602 .6981 10,891.64  
12478 .7371 9,197.38  
89681 .3685 33,047.42  
41068 .2000 8,213.60  
3111 .2437 757.95  
1207 .0649 78.20  
9153 .0930 851.25  
1310 .3453 452.25  
4071 .3685 1,500.03  
8224 .2000 1,644.80  
4088 .6500 2,657.20  
10426 .3453 3,599.96  
8355 .3453 2,884.95  
7839 .1917 1,502.53  
3144 .3063 964.45  
983 .5843 579.48  
26925 .2914 8,034.36  
3251 .4915 1,597.77  
6843 .2424 1,692.83  
1763 .2947 519.51  
995 .2191 217.99  
652 .2191 142.86  
1012 .2191 221.78  
249 .2191 54.59  
3150 .3570 1,126.98  
902 .4089 368.69  
2197 .2039 447.60  
623 .15 131.21  
19690 .15 2,953.50  
19364- .15 2,979.60

\$ 93,353.16 \$ 118,627.06

Quilw

K

9557

THE BORDEN COMPANY

*Chicago & Suburbs*

W/E 5 29 1965

RECAP TOTALS

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS 79	14777	6121	10,315.67	✓
2	HOMO VD MILK 81	11479	7371	8,461.01	✓
3	HOMO VD MILK 47 1/2	80117	3685	29,523.05	✓
4	HOMO VD MILK 26	37055	20	7,411.00	✓
7	CHOC MILK 23 1/2	2603	2437	634.21	✓
8	CHOC MILK HANDI-CPK 1/2	1936	6448	125.44	✓
10	CHOC SKIN 45 1/2	1369	3453	472.60	✓
12	BUTTERMILK 47 1/2	4918	3665	1,812.18	✓
13	BUTTERMILK 26	8920	20	1,784.00	✓
15	GOLDEN DEL-GLASS 75	3944	65	2,563.60	✓
16	GOLDEN DEL 45 1/2	9736	3453	3,361.69	✓
17	FORT SKIN 45 1/2	8643	3453	2,984.42	✓
18	FORT SKIN 25	8215	1175	1,574.65	✓
21	WHIPPING CREAM 40	6260	1175	1,693.84	✓
22	HALF&HALF 78 21	1142	3815	673.17	✓
23	HALF&HALF 21	26450	2984	7,892.54	✓
24	SOUR CREAM 61	3664	4715	1,800.85	✓
25	SOUR CREAM 29	7915	2474	1,958.01	✓
26	SOUR CREAM DIPS 21	1695	2147	499.40	✓
34	SOUR HALF&HALF 44	3770	3578	1,348.80	✓
35	TRIPLE WHIP 50	1657	4081	677.42	✓
36	YOGURT 11	2594	2026	528.57	✓
46	MAKE UP 21	1013	2108	213.40	✓
47	NUMBER GAL IN 15	18721	15	2,808.15	✓
50	NUMBER GAL OUT 15	20309	15	3,046.35	✓

\$ 88,071.32 ✓ \$ 112,289.56 ✓

L

958a

6/15/65  
63.65

THE BORDEN COMPANY

Chicago &amp; Suburbs

RECAP TOTALS

W/E 5 22 1965

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HORN VD MILK-GLASS 7 1/2	14270	6981	9,961.75	
2	HORN VD MILK 1/2	10999	7371	8,107.20	
3	HORN VD MILK 1/2	76163	3685	28,066.00	
4	HORN VD MILK 1/2	36317	20	7,263.40	
7	COND MILK 32	2458	2437	598.84	
8	COND MILK HARD 1/2	2035	6642	131.79	
10	COND SKIM 1/2	1341	1473453	462.96	
12	BUTTERMILK 47	4908	3685	1,808.52	
13	BUTTERMILK 47	8889	20	1,777.80	
15	GULF MILK-GLASS 7 1/2	3884	65	2,524.60	
16	GULF MILK 1/2	9318	3452	3,217.37	
17	FORT SKIM 1/2	9439	3453	2,913.93	
18	FORT SKIM 1/2	7648	1917	1,465.92	
21	WHIPPING CREAM 1/2	4278	3453	1,312.40	
22	HALF HALF 37	1116	5895	657.88	
23	HALF HALF 37	23709	3454	7,074.57	
24	SOUR CREAM 1/2	3049	4915	1,498.53	
25	SOUR CREAM 1/2	6996	2074	1,730.67	
26	SOUR CREAM DIPS 29	4094	2222	2,945.20	
34	SOUR HALF HALF 47	3146	3533	1,125.57	
35	TRIPLE WHIP 1/2	1216	4081	497.12	
36	YOGURT 1/2	2675	2026	545.03	
46	BAKE UP 1/2	835	2108	175.85	
47	BURRER GAL 1P 1/2	18156	15	2,723.40	
50	BURRER GAL OUT 1/2	19788	15	2,968.20	

\$ 83,618.10 \$ 106,568.11

M

959a

*Chicago & Suburbs*

THE GORDEN COMPANY

RECAP TOTALS

W/E 5 15 1965

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL 14320	6981	9,996.62 ✓	
2	HOMO VD MILK	GAL 10852	7371	7,998.81 ✓	
3	HOMO VD MILK	GAL 75878	3685	27,960.99 ✓	
4	HOMO VD MILK	QTS 36160	20	7,232.00 ✓	
7	CHCC MILK	QTS 2593	3437	631.80 ✓	
8	CHCC MILK HANDI-PK 1/2	PTS 2080	2608	134.74 ✓	
10	CHOC SKIM	1/2 GAL 45	3453	458.07 ✓	
12	BUTTER MILK	1/2 GAL 47	3685	1,932.68 ✓	
13	BUTTER MILK	QTS 9226	50	1,845.20 ✓	
15	GOLDEN DEL-GLASS	GAL 75	65	2,503.15 ✓	
16	GOLDEN DEL	1/2 GAL 45	3453	3,228.45 ✓	
17	FORT SKIM	1/2 GAL 45	3453	2,909.05 ✓	
18	FORT SKIM	QTS 7995	1417	1,532.53 ✓	
21	WHIPPING CREAM	1/2 PTS 40	3962	1,195.48 ✓	
22	HALF & HALF	QTS 70	3715	613.04 ✓	
23	HALF & HALF	PTS 24014	2984	7,165.66 ✓	
24	SOUR CREAM	16-OZ 39	2983	1,466.09 ✓	
25	SOUR CREAM	8-OZ 39	6463	1,598.81 ✓	
26	SOUR CREAM DIPS	8-OZ 39	1460	430.22 ✓	
34	SOUR HALF & HALF	PTS 44	3046	1,089.75 ✓	
35	TRIPLE WHIP	8-OZ 55	671	274.27 ✓	
36	YOGURT	1/2 PTS 44	2599	529.53 ✓	
46	WAKE UP	PTS 29	708	149.06 ✓	
47	NUMBER GAL IN	15	18170	2,725.50 ✓	
50	NUMBER GAL OUT	15	20053	3,007.95 ✓	

\$ 82,593.53 \$ 104,841.64 ✓

960a

PROJECTED ANNUAL VOLUME OF SELECTED FLUID MILK  
ITEMS OFFERED TO A.P. IN EITHER BORDEN OR PRIVATE LABEL  
BUT AVAILABLE ONLY IN BORDEN LABEL FROM BORDEN CO.  
 (Borden Zone I)

PRODUCT	Annual CX62 Zone I	Units CX56 Zone I	Assumed Annual Units	Points Per Unit (1)	Annual Points Zone I	% of Base Annual Points	Total Contract Points, Chicago & Suburbs, Selected Weeks, 1965			% of Identified Annual Point Volume			
							4Wks. End 5/29	4Wks. End 9/25	Total (2)	4Wks. End 5/29	4Wks. End 9/25	8 Selected Weeks	Selected for Projections
Homo-Paper Gallon	773,327	773,327	773,327	4	3,093,308		178,672	185,160	363,832				
" " 1/2 Gallon	5,321,403	5,321,403	5,321,403	2	10,642,806		621,544	648,150	1,269,694				
" " Quart	2,194,591	2,194,591	2,194,591	1	2,194,591		146,986	151,176	298,162				
2% - Paper 1/2 Gallon	612,231	612,231	612,231	2	1,224,462		76,188	76,494	152,682				
Fort.Skim Paper 1/2 Gallon	515,996	515,996	515,996	2	1,031,992		68,708	63,138	131,846				
" " " Quart	445,587	445,587	445,587	1	445,587		32,432	29,711	62,143				
Buttermilk " 1/2 Gallon	331,344	331,344	331,344	2	662,688		40,536	33,494	74,030				
" " " Quart	542,083	542,083	542,083	1	542,083		36,539	31,520	68,059				
Choco.Milk " "	163,037	163,037	163,037	1	163,037		10,268	13,818	24,086				
Half & Half " Pint	1,577,403	1,577,403	1,577,403	1	1,577,403		198,022	193,146	391,168				
Whipping Cream Paper 1/2 Pint	256,481	256,481	256,481	1	256,481		18,648	11,281	29,929				
Sub-Total-Borden Private Label Points					21,834,418	100.00%	1,428,543	1,437,088	2,865,631	100.00	100.00	100.00	100.00
Homo Glass Gallon	N.A.	999,752	999,752	4	3,999,008	18.32	232,424	231,624	466,048	16.27	16.26	16.26	18.32
Sub-Total Annual Point Volume					25,833,446								
2% Glass Gallon		265,390		4	1,061,560	4.86	63,100	60,716	123,816	4.42	4.22	4.32	4.96
Sub-Total - Point volume					26,895,006								
Half & Half - Paper Quart	N.A.	N.A.		2			17,468	14,752	32,220	1.22	1.03	1.12	1.12
Sour Cream - 16oz. Pint	N.A.	N.A.		2			25,340	22,464	47,804	1.77	1.56	1.67	1.67
" " - 8oz. 1/2 Pint	N.A.	N.A.		1			27,953	24,038	51,991	1.96	1.67	1.81	1.81
" Half & Half - 16 oz. Pint	N.A.	N.A.		1			25,768	20,670	46,438	1.80	1.44	1.62	1.62
Sour Cream Dips - 8 oz.	N.A.			2			8,728	5,737	14,465	.61	.40	.50	.50
Yogurt - 8 oz.	N.A.			1			10,568	8,344	18,912	.74	.58	.66	.66
Shakes - 1/2 Pint	N.A.			1/2			N.A.	9,475	9,475	-	.66	.33	.66
Tripple Whip - 8 oz.	N.A.			1			6,306	3,216	9,522	.44	.22	.33	.33
Wake Up - Pint	N.A.			1			6,644	3,742	10,386	.47	.26	.36	.36
TOTAL % OF POINTS FOR PROJECTION													31.91%

N.A. - DATA NOT INCLUDED

(1) Procedure Outline - Milk Pricing, A &amp; P - P.7

(2) See II -2

P



961a

*Chicago & Suburbs*

THE BORDEN COMPANY

RECAP TOTALS

W/E 5 8 1965

ITEM	PRODUCT	QUANTITY	PRICE	INVOICE AMT	RETAIL AMT
1	HOMO VD MILK-GLASS	GAL 7 14739	1921	10,289.11	
2	HOMO VD MILK	GAL 4 11338	7371	8,357.14	
3	HOMO VD MILK	1/2 GAL 4 78614	3225	28,969.23	
4	HOMO VD MILK	QTS 3 37454	79	7,490.80	
7	CHOC MILK	QTS 3 2614	2421	636.86	
8	CHOC MILK HANDI-PK 1/2	PTS 3 2030	3048	131.48	
10	CHOC SKIM	1/2 GAL 3 1315	3453	453.96	
12	BUTTER MILK	1/2 GAL 4 5197	3235	1,915.03	
13	BUTTER MILK	QTS 3 9504	20	1,900.80	
15	GOLDEN DEL-GLASS	GAL 15 4096	65	2,662.40	
16	GOLDEN DEL	1/2 GAL 4 9690	3453	3,345.79	
17	FORT SKIM	1/2 GAL 4 8847	3453	3,054.76	
18	FORT SKIM	QTS 3 8574	1917	1,643.41	
21	WHIPPING CREAM	1/2 PTS 4 4213	3028	1,292.43	
22	HALF HALF	QTS 2 1068	545	629.56	
23	HALF HALF	PTS 3 24838	2424	7,411.53	
24	SOUR CREAM	16-OZ 4 2974	415	1,461.64	
25	SOUR CREAM	8-OZ 3 6579	3474	1,627.51	
26	SOUR CREAM DIPS	8-OZ 3 1479	3474	435.74	
34	SOUR HALF HALF	PTS 4 2922	3578	1,045.34	
35	TRIPLE WHIP	8-OZ 5 2762	3578	1,052.26	
36	YOGURT	1/2 PTS 4 2700	3028	550.14	
46	WAKE UP	PTS 4 766	2108	161.35	
47	NUMBER GAL IN	18835	15	2,825.25	
50	NUMBER GAL OUT	19956	15	2,993.40	
				\$ 86,350.12	\$ 109,711.57

# SCHEDULE OF POINTS USED TO COMPUTE PRICES

	Point Value
All Gallons Milk Products	4
All Half Gals. "	2
All Quarts "	1
1/2 Pints Whipping Cream	1
Pints Half & Half	1
Quarts Half & Half	2
8 oz. Sour Cream	1
16 oz. Sour Cream	2
Pint (16 oz.) Sour Half & Half	1
1/2 Pint (8 oz.) St. "	1/2
8 oz. Sour Cream Dips	1
1/2 Pint Elsie Shakes	1/4
7 oz. Triple Whip	1
8 oz. Yogurt	1
Pint Coffee Whitener	1
2 Lb. Cottage Cheese	2
1 Lb. Cottage Cheese	1
8 oz. Cottage Cheese	1/2
12 oz. Cottage Cheese	1
Quart Egg Nog	1

\*These products are not subject to market fluctuations of Class 1 Milk and are not on Class 1 formula pricing.

963a

CENTRAL DIVISION  
ZONE NO. I - CHICAGO AND CALUMET AREA

CX-62C

COMMODITY	YEARLY USAGE	BORDER LABEL UNIT COST	BORDER LABEL ANNUAL COST	A & P LABEL UNIT COST	A & P LABEL ANNUAL COST	DIFFERENTIAL ANNUAL BASIS
Gals. Home Paper	773,327	\$.7371	\$ 570,024	\$.6220	\$ 481,003	\$ 89,015
½ Gals. Home	5,321,403	.3685	1,960,937	.3110	1,654,956	305,981
Qts. Home	2,194,591	.2000	438,915	.1705	374,178	64,737
Qts. Chocolate	163,037	.2437	39,723	.2150	35,053	4,675
½ Gals. Buttermilk	331,344	.3685	122,096	.3030	100,397	21,699
Qts. Buttermilk	542,083	.2000	108,420	.1560	84,565	23,855
½ Gals. 2%	612,231	.3453	211,397	.2900	177,547	33,850
½ Gals. Skim	515,996	.3453	178,169	.2820	145,511	32,658
Qts. Skim	445,587	.1917	85,419	.1440	64,165	21,254
½ Pts. Whip Cream	256,481	.3068	78,693	.2640	67,711	10,982
Pts. Half-Half	1,577,403	.2984	470,704	.2440	384,886	85,818
TOTAL			<u>\$4,264,502</u>		<u>\$3,569,978</u>	<u>\$694,524</u>

21,831,138 Qts.

R

964a

THE BORDEN COMPANY  
Central Division

9-14-65

S

CX 56C

Estimated Annual Quotation Differentials - Zone #1 (Chicago-Calumet)

Item	Size	Annual Usage In Units	Borden Label Unit Prices Week 5-8-65	Annual Value for Borden Label	A&P Label Unit Quotations	Annual Value for A & P Label	Annual Differential
Homo V.D. Milk	Glass Gallons	999,752	\$.6981	\$697,927	\$.6060	\$605,850	\$92,077 ✓
2%	Glass Gallons	265,390	.6500	172,504	.5580	148,088	24,416 ✓
Homo V.D. Milk	Paper Gallons	773,327	.7371	570,019	.6460	499,569	70,450
Homo V.D. Milk	Paper ½ " 5,321,403		.3685	1,960,937	.3230	1,718,813	242,124
Homo V.D. Milk	Paper Qts.	2,194,591	.2000	438,918	.1755	385,151	53,767
Chocolate Milk	Paper Qts.	163,037	.2437	39,732	.2178	35,509	4,223
Buttermilk	Paper ½ Gals.	331,344	.3685	122,100	.3050	101,060	21,040
Buttermilk	Paper Qts.	542,083	.2000	108,417	.1600	86,733	21,684
2%	Paper ½ Gals.	612,231	.3453	211,403	.2990	183,057	28,346
Fortified Skim Milk	Paper ½ Gals.	515,996	.3453	178,173	.2825	145,769	32,404
Fortified Skim Milk	Paper Qts.	415,587	.1917	85,419	.1500	66,838	18,581
Whipping Cream	Paper ½ Pts.	256,481	.3068	78,688	.2600	66,685	12,003
Half-Half	Paper Pints	1,577,403	.2984	470,697	.2440	384,886	85,811
				\$5,134,934		\$4,428,008	\$706,926



PROJECTED UNIT VOLUME - ASP ANNUAL FLUID MILK  
INDIANA AND ILLINOIS PARTS  
BORDEN ZONE I

II-4

Product	Factor (1)	Projection Unit	Points per Unit	Zone I Total	Points	Units	Est.-Indiana	Est.-Illinois	Part - Zone I	Units	No.
							Part - Zone I	Part - Zone I			

Homo	"	"	1/2 Gallon	3,093,308	773,327	517,088	129,272	644,055	4,828,339	2,097,160	510,450
Fort. Sklm	"	"	1/2	1,031,992	515,996	42,432	21,216	494,780	434,216	307,840	512,807
Buttermilk	"	"	1/2 Gallon	662,688	331,344	47,008	23,504	307,840	434,216	307,840	512,807
Choco Milk	"	"	Quart	542,083	542,083	29,276	29,276	307,840	434,216	307,840	512,807
HaifHaif	"	"	Pint	1,577,403	1,577,403	76,076	76,076	1,501,327	242,372	1,501,327	242,372
Whip. Cream	"	"	1/2 Pint	256,481	256,481	14,109	14,109	242,372	1,501,327	1,501,327	242,372

Sub Total - 11 Private Label Items 100.00 21,834,438 2,034,881 14

Homo	Glass Gallon	18.32	4	3,999,008	999,752	372,790	93,198	906,554	215,942	16
2%	"	4.86	4	1,061,560	265,390	98,895	49,448	215,942	110,878	16
HaifHaif	Paper-Quart	1.12	2	244,546	122,273	22,790	11,395	110,878	165,327	28
Sour Cream-16 Oz.	Pint	1.67	2	364,636	182,318	33,982	16,991	165,327	358,372	28
"	8 Oz. 1/2 Pint	1.81	1	395,203	353,718	32,965	16,480	358,372	320,753	28
"	HaifHaif Pint	1.62	1	353,718	109,172	32,965	16,480	320,753	98,998	28
"	Cream Dips - 8 Oz.	.50	1	109,172	144,107	10,174	5,087	98,998	130,677	28
Yogurt	8 Oz.	.66	1	144,107	288,216	13,430	6,715	130,677	261,356	28
Shakes	1/2 Pint	.33	1/2	72,054	78,604	7,326	3,663	78,604	71,278	28
Wake Up	Pint	.36	1	78,604	72,054	7,326	3,663	71,278	65,339	28
Tripplle Whip	8 Oz.	.33	1	72,054	72,054	6,715	3,357	65,339	65,339	28

(1) See II-3

Computation

Line 14 X Col. 3 ÷ Line 14 X Col. 5 ÷  
Col. 1 Col. 2  
(Lines 16 → 28)

Col. 4 -  
Col. 6

596a



966a

THE WORDEN COMPANY  
CENTRAL DIVISION  
ZONE NO. II - SOUTH BEND AREA

PRICES AS OF MAY 2, 1965

COMMODITY	YEARLY USAGE	BORDEN LABEL UNIT COST (ave.)	BORDEN LABEL ANNUAL COST	A & P LABEL UNIT COST	A & P LABEL ANNUAL COST	DIFFERENTIAL ANNUAL BASIS
Gals. Homo	129,272	\$.6305	\$ 81,501	3-Day \$.5948	\$ 75,709	\$ 5,792
½ Gals. Homo	493,064	.3203	157,907	6-Day .6248		
Qts. Homo	97,431	.1694	16,501	3-Day .2924	144,575	13,332
Qts. Chocolate	10,400	.2166	2,253	6-Day .3124		
½ Gals. Buttermilk	23,504	.3193	7,505	3-Day .1612	15,748	753
Qts. Buttermilk	29,276	.1687	4,940	6-Day .1712		
½ Gals. 2%	101,781	.2965	30,177	3-Day .2057	2,142	111
½ Gals. Skim	21,216	.2852	6,050	6-Day .2157		
Qts. Skim	11,371	.1601	1,820	3-Day .2844	6,695	810
½ Pts. Whip Cream	14,109	.2555	3,605	6-Day .3044		
Pts. Half-Half	76,076	.2465	18,755	3-Day .1467	4,303	637
				6-Day .1567		
				3-Day .2714	27,705	2,472
				6-Day .2914		
				3-Day .2634	5,593	457
				6-Day .2834		
				3-Day .1347	1,536	284
				6-Day .1447		
				3-Day .2547	3,602	3
				6-Day .2647		
				3-Day .2337	17,822	933
				6-Day .2447		
TOTAL			<u>\$331,014</u>		<u>\$305,430</u>	<u>\$ 25,584</u>

2,034,881 Pts = 15,6400 / PERIOD  
13

01257

PRICE ADJUSTMENT DEMONSTRATION - ZONE I  
ADJUSTMENT OF PRICES (CX62) FROM RAW MILK PRICE  
OF \$4.29 PER CWT. TO RAW MILK PRICE OF \$4.32 PER CWT.

<u>PRODUCT</u>	<u>ZONE 1 UNIT PRICE @ \$4.29 PER CX 62</u>	<u>ADJUSTMENT FOR \$.03 PER CWT. (2)</u>	<u>PRICE @ \$4.32 PER CWT.</u>
Homo - Paper Gallon	.6220	.0028	.6248
" - " 1/2 Gallon	.3110	.0014	.3124
" - " Quart	.1705	.0007	.1712
2% Paper 1/2 Gallon	.2900	.0014	.2914
Fort. Skim " 1/2 "	.2820	.0014	.2834
" " " Quart	.1440	.0007	.1447
Buttermilk " 1/2 Gallon	.3030	.0014	.3044
" " " Quart	.1560	.0007	.1567
Chocolate " "	.2150	.0007	.2157
Half & Half " Pint (1)	.2440	.0007	.2447
Whipping Cream" 1/2 Pint (1)	.2640	.0007	.2647

- (1) Point values for pricing purposes - see procedure outline - milk pricing - A&P P 7.  
 (2) Price adjustment per \$.01 per Cwt. change in price of raw milk from base price.

968<sup>a</sup>

September 21, 1965

THE BORDEN COMPANYCHICAGO - CALUMET AREA (ZONE NO. 1)GENERAL QUOTATION - A & P PRIVATE LABEL

(Related to the Present Announced Superpool Class I Price of \$4.29)

	# Net for	
	A & P	Private Label
	Net for Borden Label	Private Label
Homo V. D. Milk - Gal. Paper	\$ .7371	\$ .6220
Homo V. D. Milk - 1/2 Gal. Paper	.3685	.3110
Homo V. D. Milk - Qts. Paper	.2000	.1705
2% - Gal. Paper	.6906	.5800
2% - 1/2 Gal. Paper	.3453	.2900
Vitamin Fortified Skim - 1/2 Gal. Paper	.3453	.2820
Vitamin Fortified Skim - Qts. Paper	.1917	.1400
Half & Half - Pts. Paper	.2984	.2440
Chocolate Milk - Qts. Paper	.2437	.2150
Buttermilk - 1/2 Gal. Paper	.3685	.3030
Buttermilk - Qts. Paper	.2000	.1560
Whipping Cream - 1/2 Pts. Paper	.3068	.2640

\*(1) Above net unit prices for A & P private label products are related to delivery conditions and cooperative program as set forth on the accompanying schedule.

(2) Above net unit prices for A & P private label products are subject monthly to any change in the Class I price as such relates to the Class I price of \$4.29 per cwt. indicated above, in accordance with the price change per unit schedule attached. In addition, the above unit prices for A & P private label products are subject to change in connection with changes that occur in the cost of labor and containers.

B

969a

SCHEDULE OF POINTS USED TO COMPUTE PRICES

	Point Value
All Gallons Milk Products	4
All Half Gals. "	2
All Quarts "	1
1/2 Pints Whipping Cream	1
Pints Half & Half	1
Quarts Half & Half	2
8 oz. Sour Cream	1
16 oz. Sour Cream	2
Pint (16 oz.) Sour Half & Half	1
1/2 Pint (8 oz.) Sr. "	1/2
8 oz. Sour Cream Dips	1
1/2 Pint Elsie Shakes	1/4
7 oz. Triple Whip	1
8 oz. Yogurt	1
Pint Coffee Whitener	1
2 Lb. Cottage Cheese	2
1 Lb. Cottage Cheese	1
8 oz. Cottage Cheese	1/2
12 oz. Cottage Cheese	1
Quart Egg Nog	1

\*These products are not subject to market fluctuations of Class I Milk and are not on Class I formula pricing.



September 21, 1955

THE BORDEN COMPANY  
Central Division

Price Change Per Unit Schedule

Increase or  
Decrease per CWT.  
in Class I Price

Resulting Increase or Decrease in  
Price Per Unit

	Per Quart.	Per Half Gallon	Per Gallon
.01	.0002	.0004	.0008
.02	.0004	.0008	.0016
.03	.0007	.0014	.0028
.04	.0009	.0018	.0036
.05	.0010	.0020	.0040
.06	.0013	.0026	.0052
.07	.0015	.0030	.0060
.08	.0017	.0034	.0068
.09	.0019	.0038	.0076
.10	.0021	.0042	.0084
.11	.0024	.0048	.0096
.12	.0026	.0052	.0104
.13	.0028	.0056	.0112
.14	.0030	.0060	.0120
.15	.0033	.0066	.0132
.16	.0035	.0070	.0140
.17	.0037	.0074	.0148
.18	.0039	.0078	.0156
.19	.0041	.0082	.0164
.20	.0043	.0086	.0172
.21	.0045	.0090	.0180
.22	.0048	.0096	.0192
.23	.0050	.0100	.0200
.24	.0052	.0104	.0208
.25	.0054	.0108	.0216
.26	.0056	.0112	.0224
.27	.0059	.0118	.0236
.28	.0061	.0122	.0244
.29	.0063	.0126	.0252
.30	.0065	.0130	.0260
.31	.0067	.0134	.0268
.32	.0069	.0138	.0276

D



971a

RA+PX104

RA+PX104

IV

**BOWMAN COMPANY PRICES FOR BORDEN ZONE I**  
Class I Raw Milk - \$4.32 per cwt.

PRODUCT	1	2	3
	Illinois Portion, Borden Zone I		
	Annual Quantity (1)	Price CX50 Area 1, 2, 3	Total Annual Price
Paper-Paper Gallon	644,055	.6272	\$ 403,951.29
1/2 Gallon	4,828,339	.3136	1,514,167.11
Quart	2,097,160	.1696	355,678.33
Sub-Total - Homo-3 Items			2,273,796.73
Golden Bell Paper 1/2 Gal.	510,450	.2944	150,276.48
Skim " 1/2 "	494,780	.3008	148,829.82
" " Quart	434,216	.1632	70,864.05
Buttermilk " 1/2 Gal.	307,840	.3136	96,538.62
" " Quart	512,807	.1472	75,485.19
Elite Milk " "	152,637	.2080	31,748.50
1/2 Half " Pint	1,501,327	.2496	374,731.21
Whipping Cream " 1/2 Pint	242,372	.2560	62,047.23
Sub-Total - 8 Items			\$1,010,521.10
Sub-Total - 11 Items			3,284,317.83
Paper-Glass Gallon	906,554	.5952	\$ 539,580.94
Sub-Total-Homogenized Milk			
48.5% B.F.			
Sub-Total - 12 Items			
Sour Cream - Pint	165,327	.4064	67,188.89
" " 1/2 Pint	358,372	.2080	74,541.38
Sour 1/2 1/2 Pint	320,753	.2976	95,456.05
Sour Cream Dip 1/2 Pint	98,998	.2800	27,719.44
Acoust 8 oz.	130,677	.1728	22,580.99
Milk Shake 1/2 Pint	261,356	.0768	20,085.96
2 Milk - Glass Gallon (2)	215,942	.5888	127,146.64
Half & Half - Paper Quart (3)	110,878	.4992	55,350.30
Boston Blend - Pints (4)	71,278	.1856	13,229.20
"Quick Whip"Dispenser (5)	32,670	.3392	11,081.66
"Reddi Whip"Dispenser (5)	32,669	.4550	14,864.40
Sub-Total-Products Offered By Bowman in Private			
Label or Bowman Label and by Borden in Borden Label Only			\$ 529,244.91

Total - 21 Fluid Milk Products Offered by Bowman Co.

11 SEE UNIT VOLUME CALCULATION - II - 4

12 OFFERED BY BORDEN IN GLASS GALLONS. BOWMAN PRICE FOR 2 PAPER HALF GALLONS USED FOR COMPUTATION

13 PAPER QUART NOT OFFERED BY BOWMAN. BOWMAN PRICE FOR 2 PAPER 1/2 PINTS USED FOR COMPUTATION

14 CONSIDERED COMPARABLE TO BORDEN'S "COFFEE WAKE-UP" PINTS

15 CONSIDERED COMPARABLE TO BORDEN'S "TRIPLE WHIP". Each Product given equal weight in computation

PRODUCT	4	5	6
	Indiana Portion, Borden Zone I		
	Annual Quantity (1)	Price CX50 Area 4	Total Annual Price
Paper-Paper Gallon	129,272	.5984	\$ 77,376.86
1/2 Gallon	493,064	.2993	147,574.05
Quart	97,431	.1624	15,822.79
Sub-Total - 3 Items			240,773.40
Golden Bell Paper 1/2 Gal.	101,781	.2801	28,508.86
Skim " 1/2 "	21,216	.2865	6,078.38
" " Quart	11,371	.1560	1,773.80
Buttermilk " 1/2 Gal.	23,504	.2993	7,034.75
" " Quart	29,276	.1400	4,098.64
Elite Milk " "	10,400	.2008	2,088.32
1/2 Half " Pint	76,076	.2441	18,570.15
Whipping Cream " 1/2 Pint	14,109	.2469	3,483.51
Sub-Total - 8 Items			\$ 71,636.49
Sub-Total - 11 Items			312,369.89

\$ 67,915.71

This Computation Reflects The Lower Bowman Price  
in the Indiana Portion of Borden's Zone I, Where Bowman's  
Area 4 Price for 3 day per week Delivery Prevailed

7	8	10	Line
Total Annual Quantity (1)	Total Annual Price	Reference Line CX50 Exhibits A & D	No.
773,327	(Col. 3 & Col 6)	4	
5,321,403		2	
2,194,591		1	
	\$2,514,530.13		
612,231			
515,996		19	
445,587		17	
331,344		18	
542,083		13	
163,037		14	
1,577,403		15	
256,481		6	
		7	14
	1,082,157.59		
	3,596,687.72		
999,752	\$ 592,880.88	3	17
	\$2,107,411.01		
	\$4,189,568.60		
182,318			
395,203		11	
353,718		12	
109,172		5	
144,107		21	
288,216		20	
265,390		16	
122,273		19	
78,604		6	
36,028		10	
36,026		8	
		9	
	\$ 597,160.62		33
	\$4,786,729.22		
			Line 20+33 35

A

12-1

EXHIBIT A

25 - METROPOLITAN CHICAGO - NORTHWESTERN AND NORTH CENTRAL ILLINOIS

STORE SERVICE SIX DAYS WEEKLY

	SCHEDULE 1							
	DIRECT COST FOR CHICAGO AREA PLANT	MARKUP	NET PRICE AT CHICAGO AREA PLANT	DIRECT VARIATION COST TO SALES AREA	Direct Cost delivery per point	COMMISSION	NET DELIVERED PRICE SIX DAY RATE	
QTS. HOMO. V.D.	1302	.0081	1283	.0025	.0206	.0082	16.96	
1/2 GAL. HOMO. V.D. (GLASS)								
1/2 GAL. HOMO. V.D. (PINT)	2390	.0119	2509	.0051	.0412	.0164	3136	
1/2 GAL. HOMO. V.D. - GLASS	4402	.0252	4154	.0146	.0824	.0328	5952	
1/2 GAL. HOMO. V.D. - PAPER	4878	.0141	5019	.0101	.0824	.0328	6272	
QTS. LOW-CAL								
PN. SQUID HALF & HALF	2385	.0275	2660	.0028	.0206	.0082	2976	
FTS. HALF & HALF	2914	.0180	2734	.0014	.0206	.0082	2996	
QTS. RICH CREAM								
FTS. RICH CREAM								
1/2 QT. RICH CREAM								
QTS. WHIP CREAM								
1/2 QT. WHIP CREAM	2023	.0180	2203	.0009	.0206	.0082	2290	
QUICK-WHIP DISPENSER	2742	.0252	3055	.0009	.0206	.0082	3342	
QUICK-WHIP DISPENSER	4075	.0178	4253	.0009	.0206	.0082	4540	
30SODA BLEND - RTS.	1445	.0109	1554	.0014	.0206	.0082	1756	
FTS. SODA CREAM	3001	.0315	3316	.0112	.0412	.0164	4040	
1/2 QT. SODA CREAM	1426	.0250	1726	.0056	.0206	.0082	2080	
1/2 GAL. BUTTERMILK	2259	.0250	2509	.0051	.0412	.0164	3136	
QTS. BUTTERMILK	1003	.0156	1159	.0025	.0206	.0082	1472	
QTS. BUTTERMILK	1617	.0150	1767	.0025	.0206	.0082	2080	
1/2 FTS. DART-HIGH CARRY PACK								
1/2 FTS. CHOCOLATE SHAKE	0591	.0095	0686	.0009	.0052	.0021	0714	
1/2 GAL. STA-FIT	2131	.0250	2381	.0051	.0412	.0164	3008	
1/2 GAL. STA-FIT	1163	.0156	1319	.0025	.0206	.0082	1622	
1/2 GAL. STA-FIT	2106	.0211	2317	.0051	.0412	.0164	2944	
YOGURT (Plain & Strawberry)	1425	.0006	1431	.0009	.0206	.0082	1723	
SNACK DIP - 602.	2458	.0045	2503	.0009	.0206	.0082	2800	

CLASS I PRICE - 4.32 per CWT.

\* Checked & printed (approx 6/1)

Al Juma

REFERENCE  
LINE

36 - 3/21/65

EXHIBIT 15

NET PRICES-INDIANA AREA  
STORE SERVICE THREE DAYS WEEKLY

	SCHEDULE 1 DIRECT COST FOB CHICAGO AREA PLANT	MARKUP	NET PRICE AT CHICAGO AREA PLANT	DIRECT VANNING COST TO SALES AREA	Direct Cost of delivery per point	Commission	NET DELIVERED PRICE-THREE DAYS WEEKLY
QTS. MONO. V.D.	.1302	.0081	.1383	.0254	.0134	.0252	.1624 PL
1/2 GAL. MONO. V.D. (GLASS)							
1/2 GAL. MONO. V.D. (PAPER)	.2392	.0119	.2509	.0112	.0268	.0134	.2793 PL
QAL. MONO. V.D. - GLASS	.1802	.0252	.4654	.0221	.0536	.0208	.5719
QAL. MONO. V.D. - PAPER	.1828	.0141	.5019	.0221	.0546	.0224	.5789 PL
QTS. LOW-CAL							
QTS. SWEET HALF & HALF	.2385	.0325	.3662	.0061	.0134	.0252	.3927
QTS. HALF & HALF	.2014	.0180	.2194	.0261	.0134	.0252	.2621 PL
QTS. RICH CREAM							
QTS. RICH CREAM							
1/2 RT. RICH CREAM							
QTS. WHIP CREAM							
1/2 RT. WHIP CREAM	.2083	.0180	.2263	.0020	.0134	.0252	.2477 PL
1/2 RT. WHIP CREAM DISPENSER	.2742	.0353	.3095	.0220	.0134	.0252	.3501
1/2 RT. WHIP CREAM DISPENSER	.1045	.0178	.1223	.0020	.0134	.0252	.1429
1/2 RT. WHIP CREAM - 1/2 RT.	.1445	.0109	.1554	.0031	.0134	.0252	.1721
QTS. SOUP CREAM	.3021	.0325	.3346	.0183	.0268	.0104	.3811
1/2 RT. SOUP CREAM	.1486	.0250	.1736	.0112	.0134	.0252	.2034
1/2 GAL. BUTTERMILK	.2257	.0250	.2507	.0112	.0268	.0104	.2981 PL
QTS. BUTTERMILK	.1002	.0156	.1159	.0255	.0134	.0252	.1420 PL
QTS. BAKED RICH	.1617	.0152	.1767	.0255	.0134	.0252	.2004 PL
1/2 RT. BAKED RICH CARRY PACK							
1/2 RT. CHOCOLATE SHAKE	.0591	.0055	.0646	.0020	.0234	.0212	.0753
1/2 GAL. STAY-FIT	.3131	.0250	.3381	.0112	.0268	.0104	.3853 PL
QTS. STAY-FIT	.1163	.0156	.1319	.0055	.0134	.0252	.1560 PL
1/2 GAL. YOGURT	.2106	.0211	.2317	.0112	.0268	.0104	.2691 PL
YOGURT (Plain & Strawberry)	.1425	.0206	.1631	.0020	.0134	.0252	.1837
SNACK DIP - 8 OZ.	.2458	.0245	.2703	.0020	.0134	.0252	.2909

CLASS I PRICE - 4.32 per CWT.

REFERENCE  
LINE

974a

THE BORDEN COMPANY  
Central Division

9-14-65

Estimated Annual Quotation Differentials - Zone #1. (Chicago-Calumet)

			Annual Usage In Units	Borden Label Unit Prices Week 5-8-65	Annual Value for Borden Label	A&P Label Unit Quotations	Annual Value for A & P Label	Annual Differ- ential
Item		Size						
Homo V.D. Milk	Glass	Gallons	999,752	\$.6981	\$697,927	\$.6060	\$605,850	\$92,077 ✓
2%	Glass	Gallons	265,390	.6500	172,504	.5580	148,088	24,416 ✓
Homo V.D. Milk	Paper	Gallons	773,327	.7371	570,019	.6460	499,569	70,450
Homo V.D. Milk	Paper	½ "	5,321,403	.3685	1,960,937	.3230	1,718,813	242,124
Homo V.D. Milk	Paper	Qts.	2,194,591	.2000	438,918	.1755	385,151	53,767
Chocolate Milk	Paper	Qts.	163,037	.2437	39,732	.2178	35,509	4,223
Buttermilk	Paper	½ Gals.	331,344	.3685	122,100	.3050	101,060	21,040
Buttermilk	Paper	Qts.	542,083	.2000	108,417	.1600	86,733	21,684
2%	Paper	½ Gals.	612,231	.3453	211,403	.2990	183,057	28,346
Fortified Skim Milk	Paper	½ Gals.	515,996	.3453	178,173	.2825	145,769	32,404
Fortified Skim Milk	Paper	Qts.	445,587	.1917	85,419	.1500	66,838	18,581
Whipping Cream	Paper	½ Pts.	256,481	.3068	78,688	.2600	66,685	12,003
Half-Half	Paper	Pints	1,577,403	.2984	470,697	.2440	384,836	35,811
Total					\$5,134,934		\$4,428,008	\$706,926



975a

BORDEN COMPANY PRICES TO BE PAID FOR FLUID MILK ITEMS  
EQUIVALENT TO FLUID MILK ITEMS OFFERED BY BORDEN CO. (CX-50)  
in BORDEN ZONE I

	1	2	3	4	5	6	7	8	9
		<u>Borden Company Price</u>							
	Annual	CX50e	CX50	Asst. Billings, Chicago &	Price Com-	Total Annual	TO	SOURCE	
	Quantity (1)	\$4.32/ Cwt. (2)	\$4.32/ Cwt.	SUBURBS, Sept. 1965 (3)	pared with Borden Price	Price Col. 1xCol. 5	SUMMARY PAGE	OF COMPUTATION	
Homos - Paper Gallon	773,327	.6248	.6460	.7371	.6248	483,174.70			1
" " 1/2 Gallon	5,321,403	.3124	.3210	.3685	.3124	1,662,406.29			3
" " Quart	2,194,591	.1712	.1755	.2000	.1712	375,713.97			4
Sub Total - Homos - Paper - 3 Items						2,521,294.96	2,521,294.96	Lines 1 + 3	7
Adjustment to 3.5% B.F. (4)						25,345.75	25,345.75		6
Homos Milk, Adjusted @ 3.5% B.F.						2,546,640.71	2,546,640.71	Lines 4 + 5	7
" " Paper 1/2 Gallon	612,231	.2914	.2990	.3453	.2914	178,404.11			14
Port. Skim " 1/2 "	515,996	.2634	.2625	.3453	.2634	146,233.26			15
" " " Quart	445,587	.1447	.1500	.1917	.1447	64,476.46			16
Buttermilk " 1/2 Gallon	331,344	.3044	.3050	.3965	.3044	100,861.11			17
" " " Quart	342,083	.1567	.1600	.2000	.1567	54,544.41			18
Chocolate " " "	163,037	.2157	.2178	.2437	.2157	35,167.03			19
Milk & Half " Pint	1,577,403	.2447	.2440	.2906	.2447	384,980.51			20
Whipping Cream " 1/2 Pint	256,481	.2647	.2600	.3068	.2647	67,845.32			21
Sub Total - 3 Additional Items Offered in Private Label						1,063,957.48	1,063,957.48	Lines 7 + 14	22
Sub Total - 11 Items, Homos. @ 3.5% B.F.						3,610,608.19	3,610,608.19	Lines 6 + 15	23
Milk - Glass Gallon	999,752	N.A.	.6060 (3)	.6961	.6961	697,926.87	697,926.87		24
Adjustment to 3.5% B.F. (4)						6,242.45			25
Milk - Glass Gallons - @ 3.5% B.F.						704,169.32	704,169.32	Lines 17 + 18	26
Total, Homogenized Milk @ 3.5% B.F.						3,250,810.03	3,250,810.03	Lines 6 + 19	27
Light Cream - 16 oz. Pint	162,316	N.A.	N.A.	.4915	.4915	89,609.30			28
" " - 8 oz. 1/2 Pint	395,203	N.A.	N.A.	.2474	.2474	97,771.22			29
Dark Cream - 16 oz. Pint	353,718	N.A.	N.A.	.3574	.3574	126,560.30			30
Dark Cream Dip - 8 oz. 1/2 Pint	109,172	N.A.	N.A.	.2947	.2947	32,173.99			31
Yogurt 8 oz.	144,107	N.A.	N.A.	.2038	.2038	29,363.01			32
Milk Shake 1/2 Pint	289,216	N.A.	N.A.	.0930	.0930	26,804.09			33
Milk - Glass Gallons	265,150	N.A.	.5500 (3)	.6500	.6500	172,503.50			34
Milk & Half Paper Quart	122,273	N.A.	N.A.	.5895	.5895	72,079.93			35
" " " "	78,604	N.A.	N.A.	.2108	.2108	16,569.72			36
"Whipped Whip"	72,054	N.A.	N.A.	.4089	.4089	29,462.88			37
Sub Total - 19 Items Offered only in Borden Label						692,850.94	692,850.94	Lines 21 + 30	38
Total - 32 Fluid Milk Items						5,007,628.45	5,007,628.45	Lines 15 + 20 + 32 = 16 + 19 + 32	39

(1) See Unit Volume Calculation - Case and Company Calculation II-4

(2) See Price Adjustment Demonstration - III

(3) Reduced Prices on these items were withdrawn when prices on certain private label items in paper were reduced.

(4) See Calculation of Butterfat Adjustment - V-2

(5) See Billing Summary for Week Ending 9/11/65

N.A. Not Available

A



CALCULATION OF BUTTERFAT ADJUSTMENT, ZONE I

Column Number Product	(1) Annual Unit Usage, Zone I CX62C & 56C	(2) Quarts Per Unit	(3) Total Quarts (1)x(2)	(4) Value Per Quart of 0.1% B.F. (1)	(5) Annual Val. of Butterfat
Homo - Paper Gal.	773,327	4	3,093,308		
" " ½ Gal.	5,321,403	2	10,642,806		
" " Quart	2,194,591	1	2,194,591		
" " Total			15,930,705	\$ .001591	\$25,345.75
Homo - Glass Gal.	999,752	4	3,999,008	\$ .001591	\$ 6,242.45

(1) CX62 : Value of 0.1% B.F. per 100 Lbs. Raw Milk = \$.0740

Weight of One Quart Homo = 2.15 lb.

∴ Value of 0.1% B.F. in One Quart is ,

$$\frac{2.15 \text{ lbs.}}{100.0 \text{ lbs.}} = \frac{X}{\$ .0740}$$

$$X = \frac{2.15}{100} (.0740)$$

$$= \$ .001591$$

B

Schedule #1

FORMULA PRICE FOR RAW MILK

Per Hundred Pounds

Producer Price - 3.5% B.F.

\$ 4.2900

Market Administrator's Fee

.0200

Shrinkage 1%

.0045

Procurement, Bulk Tank Premiums

Association Fees, Inner Zone Premiums, etc.

.2500

Total Cost of 3.5% Raw Milk

\$ 4.5645

F.O.B. Our Plant

To 3.4% B.F. Finished Product

.0740

Cost of 3.4% Finished Product

\$ 4.4905

MILK COST BY ITEMS

Quart 2.15 pounds x \$4.4905 per cwt. = \$ .0966

Half Gallon 4.30 pounds x \$4.4905 per cwt. = .1931

Gallon 8.60 pounds x \$4.4905 per cwt. = .3862

2

978a

THE BORDEN COMPANY  
Central Division

9-14-65

CX 56C

LD

Estimated Annual Quotation Differentials - Zone #1 (Chicago-Calumet)

Item	Size	Annual Usage In Units	Borden Label Unit Prices Week 5-8-65	Annual Value for Borden Label	A&P Label Unit Quotations	Annual Value for A & P Label	Annual Differ- ential
Homo V.D. Milk	Glass Gallons	999,752	\$.6981	\$697,927	\$.6060	\$605,850	\$92,077 ✓
2%	Glass Gallons	265,390	.6500	172,504	.5580	148,088	24,416 ✓
Homo V.D. Milk	Paper Gallons	773,327	.7371	570,019	.6460	499,569	70,450
Homo V.D. Milk	Paper ½ "	5,321,403	.3685	1,960,937	.3230	1,718,813	242,124
Homo V.D. Milk	Paper Qts.	2,194,591	.2000	438,918	.1755	385,151	53,767
Chocolate Milk	Paper Qts.	163,037	.2437	39,732	.2178	35,509	4,223
Buttermilk	Paper ½ Gals.	331,344	.3685	122,100	.3050	101,060	21,040
Buttermilk	Paper Qts.	542,083	.2000	108,417	.1600	86,733	21,684
2%	Paper ½ Gals.	612,231	.3453	211,403	.2990	183,057	28,346
Fortified Skim Milk	Paper ½ Gals.	515,996	.3453	178,173	.2825	145,769	32,404
Fortified Skim Milk	Paper Qts.	415,587	.1917	85,419	.1500	66,838	18,581
Whipping Cream	Paper ½ Pts.	256,481	.3068	78,688	.2600	66,685	12,003
Half-Half	Paper Pints	1,577,403	.2934	470,697	.2440	384,886	85,811
Total				\$5,134,934		\$4,428,008	\$706,926

979a

CENTRAL DIVISION  
ZONE NO. I - CHICAGO AND CALUMET AREA

CX 62C

COMMODITY	YEARLY USAGE	BORDER LABEL UNIT COST	BORDER LABEL ANNUAL COST	A & P LABEL UNIT COST	A & P LABEL ANNUAL COST	DIFFERENTIAL ANNUAL BASIS
Gals. Homo Paper	773,327	\$.7371	\$ 570,024	\$.6220	\$ 481,009	\$ 89,015
½ Gals. Homo	5,321,403	.3685	1,960,937	.3110	1,654,956	305,981
Qts. Homo	2,194,591	.2000	438,915	.1705	374,178	64,737
Qts. Chocolate	163,037	.2437	39,728	.2150	35,053	4,675
½ Gals. Buttermilk	331,344	.3685	122,096	.3030	100,397	21,699
Qts. Buttermilk	542,083	.2000	108,420	.1560	84,565	23,855
½ Gals. 2%	612,231	.3453	211,397	.2900	177,547	33,850
½ Gals. Skim	515,996	.3453	178,169	.2820	145,511	32,658
Qts. Skim	445,587	.1917	85,419	.1440	64,165	21,254
½ Pts. Whip Cream	256,481	.3068	78,693	.2640	67,711	10,982
Pts. Half-Half	1,577,403	.2984	470,704	.2440	384,886	85,818
TOTAL			<u>\$4,264,502</u>		<u>\$3,569,978</u>	<u>\$694,524</u>

21,831,438 Qts.

RPT 8  
 10/14/4  
 3/28/44  
 (2)

980a

I-1

ESTIMATED AVERAGE MONTHLY LIST PRICE VALUE OF  
 A&P FLUID MILK LINE PURCHASED FROM BORDEN  
 IN AREA COVERED BY BOWMAN CO. BID (CX50)

LINE NO.	TOTAL A&P VOLUME, 6TH PERIOD END. 6/26	NUMBER OF 4 WEEK PERIODS/YR.	EST. ANNUAL VOLUME
2	CHICAGO METROPOLITAN 3,356,722 (1)	13	43,637,386
4	EASTERN IOWA - CENTRAL ILLINOIS 743,085 (1)	13	9,660,105
6	TOTAL 4,099,807	13	53,297,491
10	WEIGHTED AVERAGE BOWMAN LIST PRICE PER POINT (2)		\$ .25745
13	ESTIMATED ANNUAL VALUE (3)		\$13,721,439
17	ESTIMATED AVERAGE MONTHLY VALUE (4)		\$ 1,143,453

- (1) SOURCE - CX42D
- (2) PRICES IN CX50D EXTENDED BY ANNUALIZED QUANTITIES FOR ZONES I.  
TOTAL LIST PRICE VALUE DIVIDED BY POINT VOLUME (SEE  
CALCULATION ATTACHED) I-2

(3) LINE 6 x LINE 10

(4) LINE 13 ÷ 12

FEDERAL TRADE COMMISSION	
Docket No. 586-5	Exhibit No. 168-A
In the matter of <u>FTC v. Borden</u>	
Date <u>3/28/44</u>	Witness <u>Reporter 24</u>

A



THE BORDEN COMPANY 8/16/65

CENTRAL DIVISION

DATA - RE: A & P SALES - FLUID MILK  
BASED ON 6TH PERIOD ENDED JUNE 26

(1) Percentage of A & P Sales to  
Total Sales - Central Division - Points Sold

Region	Total A&P Volume	Grand Total	Central Division Sales		Percent of A&P Sales	
			Wholesale Rto. Sales	To: Grand Total	Wholesale Rto. Sales	To: Grand Total
Chicago Metropolitan	3,356,772	13,291,969	(1)6,027,418	25.2	55.7	
Eastern Iowa-Central Illinois	743,085	4,248,423	2,580,398	17.5	28.8	
Western Iowa	9,618	3,254,249	771,840	3	1.2	
Wisconsin	851,751	8,755,366	3,536,438	9.7	24.1	
Grand Total	4,961,226	29,550,007	12,916,094	16.8	38.4	

(1) Excludes bulk route sales of 1,209,267 points  
to Total Woodstock Production - Points

Total A & P Sales Produced -  
Total Woodstock



I-1 983a

## FOR COMPARISON OF BOWMAN/BORDEN BIDS

I-2

## CHICAGO &amp; SUBURBS BILLING SUMMARIES (1)

LINE NO.	ANNUAL UNITS	POINT VALUE	ANNUAL POINTS	TOTAL POINTS 4 WKS. END 5/29/65	% OF INDEX VALUE	TOTAL POINTS 4 WKS. END 9/25/65	% OF INDEX VALUE	AVE. INDEX VALUE POINTS	ANNUAL POINTS	ANNUAL UNITS	LIST PRICE C/SOD	ANNUAL LIST PRICE
MEMO - PAPER GALLON	773,327	4	3,093,308	11.97	179,672	11.44	185,160	11.76		773,327	.98	757,860.46
1/2 GALLON	5,321,403	2	10,642,806	41.20	621,544	39.79	648,150	41.18		5,321,403	.49	2,607,487.40
QUART	2,194,591	1	2,194,591	8.50	146,906	9.41	151,176	9.60		2,194,591	.265	581,264.61
SUB TOTAL			15,930,700	61.67	947,202	60.64	984,486	62.54				
2% - (GOLDEN DEL)												
1/2 GALLON	612,231	2	1,224,462	4.73	76,188	4.88	76,494	4.06		612,231	.46	281,626.36
FORT. SKIM 1/2 GALLON	515,996	2	1,031,992	3.99	68,700	4.40	63,138	4.01		515,996	.47	242,118.12
QUART	445,587	1	445,587	1.73	32,432	2.08	29,711	1.89		445,587	.225	113,624.68
BUTTERMILK 1/2 GALLON	331,344	2	662,688	2.58	40,536	2.60	33,494	2.13		331,344	.49	162,338.56
QUART	542,093	1	542,093	2.10	36,539	2.34	31,520	2.00		542,093	.23	124,600.00
CHOCO. MILK QUART	163,037	1	163,037	.63	10,268	.65	12,818	.88		163,037	.325	52,500.00
HALF & HALF PINT	1,577,403	1	1,577,403	6.10	99,011	6.34	96,573	6.13		1,577,403	.39	615,187.17
MIL CREAM 1/2 PINT	256,481	1	256,481	.99	10,648	1.19	11,281	.72		256,481	.40	102,692.47
8 ITEM SUB TOTAL			5,903,733	22.85	382,310	24.43	356,029	22.62				
11 ITEM SUB TOTAL			21,834,441	84.52	1,329,543	85.12	1,340,515	85.16		21,834,441	.2411	5,642,407.74
17 MEMO - GLASS GALLON	999,752	4	3,999,008	15.40	232,424	14.88	233,624	14.84		999,752	.93	929,769.36
18 SUB TOTAL LINE 15 & 17			25,833,449	100.00%	1,561,967	100.00	1,574,139	100.00	100.00	25,833,449	---	6,572,257.14
19 2% - (GOLDEN DEL)												
GLASS GALLON	265,390	4	1,061,560	4.11	63,100	4.04	60,716	3.86		265,390	.92	244,158.80
20 HALF & HALF, QUART PAPER	NOT GIVEN	2			8,734	.56	7,376	.47		149,834	.78	58,183.51
21 SOUR CREAM, PT. (16 OZ.)	"	2			25,340	1.62	22,464	1.43		390,083	.635	123,832.30
22 " 1/2 PT. (8 OZ.)	"	1			27,953	1.78	24,038	1.53		426,252	.325	138,521.91
23 HALF & HALF QUART	"	2			25,768	1.66	20,670	1.31		372,002	.465	86,490.47
24 SOUR CREAM DIPS (8 OZ.)	"	1			8,728	.56	5,737	.36		118,834	.40	47,533.60
25 YOGURT	"	1			10,568	.68	8,344	.53		139,501	.27	37,665.27
26 SHAKES 1/2 PINT	"	1/2			---	---	9,375	.60		77,500	.12	27,200.00
SUB TOTAL LINES 19-26					170,191	10.90	158,820	10.09		1,715,939		773,539.87
TRIPLE WHIP, 8 OZ.	NOT GIVEN	1			6,306	.40	3,216	.20	.30	77,500	.53	41,075.00
WAKE UP PINT	"	2			6,694	.43	3,742	.24	.33	85,250	.29	12,764.25
CHOCO. SKIM, 1/2 GALLON	NOT GIVEN	2			10,704	.69	9,890	.63	.66	170,501	.46	39,244.46
CHOCO. 1/2 PT. HANDI PAKS	"	1/2			2,020	.13	1,205	.08	.12	31,000	.085	10,540.00
(1) SEE I-1										28,933,268		7,448,984.72

Average List Price Per Point .25745

FEDERAL TRADE COMMISSION  
 Docket No. 85-1000-1  
 COMMISSIONER  
 RESPONDENT EXHIBIT No. 100-1000-1

D

1981

VOLUME OF A&P FLUID MILK ITEMS - CHICAGO & SUBURBS - 1962  
(SELECTED ITEMS)

1-3

Points/ Unit P.7 Procedures Outline	5/8	5/12	5/22	5/29	Total for May	Total Points Col. 1x6 May	9/4	9/11	9/18	9/25	Total for September	Total Points Col. (1)x(12)	LINE NO.
Homo-Paper-Gallon	4	11,338	10,052	10,999	11,479	44,668	178,672	12,478	10,845	11,296	46,290	105,160	
- 1/2 Gallon	2	78,614	75,078	76,163	80,117	310,772	621,544	89,681	73,548	79,493	324,075	648,150	
- Quart	1	37,454	36,160	36,317	37,055	146,236	190,900	41,068	34,174	37,617	151,176	151,176	
Sub-Total						502,426							
7%-(Golden Bell) 1/2 Gallon	2	9,600	9,350	9,310	9,736	38,094	76,188	10,426	8,937	9,456	38,247	76,494	
Port. Skim - 1/2 Gallon	2	8,847	8,425	8,439	8,543	34,354	68,708	8,355	7,299	7,894	31,569	63,138	
- Quart	1	8,574	7,995	7,648	8,215	32,432	32,432	7,839	6,997	7,234	29,711	29,711	
Buttermilk 1/2 Gallon	2	5,197	5,245	4,908	4,918	20,269	40,536	4,071	4,086	4,087	16,747	33,494	
Quart	1	9,504	9,226	8,889	8,920	36,539	36,539	8,224	7,385	7,726	31,520	31,520	
Choco.Milk Quart	1	2,614	2,593	2,458	2,603	10,268	10,268	3,111	2,556	2,850	13,818	13,818	
Half & Half Pint	1	24,838	24,014	23,709	26,450	99,011	99,011	26,975	22,323	23,659	96,573	96,573	
Wh. Cream 1/2 Pint	1	4,213	3,897	4,278	6,260	18,648	18,648	3,144	2,517	2,850	11,281	11,281	
0 Item Sub-Total						289,614							
11 Item Sub-Total						792,040							
Homo-Glass-Gallon	4	14,739	14,720	14,270	14,777	58,106	232,424	18,602	13,628	14,664	58,406	233,624	
Sub-Total Line 15 & Line 17						850,146							
7%-(Golden Bell) Glass Gallon	4	4,096	3,851	3,884	3,944	15,775	63,100	4,088			15,179	60,716	
Half & Half, Quart Paper	2	1,069	1,040	1,116	1,142	4,367	8,734	903	3,564	3,802	11,232	22,464	
Sour Cream -Pt. (16 oz.)	2	2,974	2,981	3,049	3,064	12,670	25,340	3,251	879	904	11,232	22,464	
" 1/2 Pt. (8 oz.)	1	6,579	6,463	6,996	7,015	27,953	27,953	6,843	2,727	2,630	10,335	20,670	
" Half & Half - Pt.	2	2,922	3,046	3,146	3,770	12,864	25,768	3,150	5,610	5,773	11,232	22,464	
Sour Cream Dips-(8 oz.)	1	1,479	1,460	4,094	1,695	8,748	8,748	1,703	2,593	2,360	10,335	20,670	
Yogurt	1	2,700	2,599	2,675	2,594	10,568	10,568	2,197	1,275	1,330	5,737	11,474	
Shakes 1/2 Pint	1	-	-	-	-	-	-	9,153	6,664	14,547	7,535	3,216	
Sub Total Line 19-26						92,945							
Triple Whip 8 oz	1	2,762	671	1,216	1,657	6,306	6,306	902	621	706	3,216	3,216	
Wake Up Pint	2	766	708	835	1,013	3,322	6,644	623	427	449	1,871	3,742	
Choco.Skim - 1/2 Gal	2	1,315	1,327	1,341	1,369	5,352	10,704	1,310	1,112	1,227	4,945	9,890	
Choco 1/2 Pint Handi Paks	1	2,030	2,080	2,035	1,936	8,081	2,020	1,207	1,005	1,281	4,821	1,205	

E



985a

## SCHEDULE OF POINTS USED TO COMPUTE PRICES

	Point Value
All Gallons Milk Products	4
All Half Gals. "	2
All Quarts "	1
1/2 Pints Whipping Cream	1
Pints Half & Half	1
Quarts Half & Half	2
8 oz. Sour Cream	1
16 oz. Sour Cream	2
Pint (16 oz.) Sour Half & Half	1
1/2 Pint (8 oz.) S. "	1/2
8 oz. Sour Cream Dips	1
1/2 Pint Elsie Shakes	1 1/4
7 oz. Triple Whip	1
8 oz. Yogurt	1
Pint Coffee Whitener	1
2 Lb. Cottage Cheese	2
1 Lb. Cottage Cheese	1
8 oz. Cottage Cheese	1/2
12 oz. Cottage Cheese	1
Quart Egg Nog	1

\*These products are not subject to market fluctuations of Class I Milk and are not on Class I formula pricing.

221





Borden Dock Price

f.o.b. Woodstock, Ill.

and

Estimated Store Delivered Costs, using Eagle employed contract carrier or Eagle's own transport equipment to stores located in the Joliet, Peru, Plano, Morris and Princeton areas.

(1) It is up to Eagle as the buyer at Borden's dock to arrange for the transportation to its stores. Contract carriers are available for this purpose.

(2) We believe that one such contract carrier has the transportation service available on the following basis:

(a) Delivery Schedule - 3 Day Basis.

(b) Rate: 32¢ per mile, plus 8¢ per case.

(c) Estimated Cost:

900 Miles at 32¢ per mile	=	\$288.00
2100 cases @ 8¢ per case	=	168.00
Trailer		60.00
Tolls, etc.		26.00

Total

\$542.00

Average Cost per point

.0109

Average Cost per 1/2 Gallon

.0218

(d) Applying the average cost per point shown under (c) above, it is estimated that the unit cost delivered to the stores listed below would approximate the figures shown, under Column 2 of the following schedule

(e) It may well be that Eagle as a dock purchaser may arrange a delivery cost from a different carrier at a lesser cost.

(f) Stores included in Estimated Costs (item c above)

#33 Joliet

#158 Plano

#34 Morris

#227 Peru

#39 Princeton

SCHEDULE SHOWING DOCK PRICES (F. O. B. PEKIN, ILLINOIS)

AND

ESTIMATED STORE DELIVERED COSTS USING EAGLE EMPLOYED  
CONTRACT CARRIER OR EAGLE'S OWN TRANSPORT EQUIPMENT

Product	Size	Point Value	F. O. B. Pekin, Illinois	Dock Price	Estimated Store Delivery Cost (1)	Present Prices
<u>Food Club</u>						
Homo Milk 3. 3% B. F.	Gallon	4	\$ .6496	\$	.6940	.7340
Homo Milk 3. 3% B. F.	1/2 Gal.	2	.3238		.3460	.3670
2%	Gallon	4	.5996		.6440	.6785
2%	1/2 Gal.	2	.2988		.3210	.3393
Fortified Skim	1/2 Gal.	2	.2499		.2721	.2987
Half & Half	Pint	1	.1851		.1962	.2347
Cottage Cheese	Lb.	1	.2289		.2400	.2524
" "	1/4	7	.4321		.4546	
<u>Borden Label</u>						
Homo Milk-Glass	3. 3% B. F.	4	.6397		.6840	.7144
Homo Milk-Paper	3. 3% B. F.	4	.6596		.7040	.7540
Homo Milk	3. 3% B. F.	2	.3288		.3510	.3770
Homo Milk	3. 3% B. F.	1	.1760		.1871	.1900
2%	Gallon	4	.6096		.6540	.6985
2%	1/2 Gal.	2	.3038		.3260	.3493
Chocolate Milk	Quart	1	.2045		.2156	.2098
Chocolate Skim	1/2 Gal.	2	.2898		.3120	-
Fortified Skim	1/2 Gal.	2	.2549		.2771	.3087
Fortified Skim	Quart	1	.1334		.1445	.1553
Buttermilk	1/2 Gal.	2	.2683		.2905	.3522
Buttermilk	Quart	1	.1371		.1482	.1771
Half & Half	Quart	2	.3665		.3887	-
Half & Half	Pint	1	.1876		.1987	.2397
Whipping Cream	1/2 Pint	1	.1963		.2074	.2296
Sour Cream	16 oz.	2	.3099		.3321	-
Sour Cream	8 oz.	1	.1695		.1806	.2177
Sour Half & Half	16 oz.	1	.2414		.2525	-
Sour Cream Dip	8 oz.	1	.1693		.1804	.2266
Cottage Cheese	8 oz.	1/2	.1310		.1366	.1445
Cottage Cheese	Lb.	1	.2314		.2425	.2574
Cottage Cheese	2 Lb.	2	.4374		.4596	.4675
Cottage Cheese	Lb.	1	.2653-2664		.2764 2675	.2698
Cottage Cheese-Flav.	Lb.	1	.2747-2771		.2858 2869	.1814
Dry Curd Cheese	12 oz.	1				

(1) Considers stores located in McComb, Illinois and Burlington, Iowa.

BORDEN DOCK PRICEF.O.B. PEKIN, ILLINOIS

and

ESTIMATED STORE DELIVERED COST  
 USING EAGLE EMPLOYED CONTRACT CARRIER  
 OR EAGLE'S OWN TRANSPORT EQUIPMENT  
 TO STORES LOCATED AT McCOMB AND  
 BURLINGTON

- (1) It is up to Eagle as the buyer at Borden's dock to arrange for the transportation to its stores. Contract Carriers are available for this purpose.
- (2) We believe that one such contract carrier has the transportation service available on the following basis:

(a) Delivery Runs - one 3-day run per week.

(b) Rates: 37¢ per mile plus a \$2.50 charge per stop plus 2-1/2¢ per case over 100 cases.

(c) Estimated Cost:

645 miles @ 37¢ per mile plus 10%      \$ 263.00  
 18 stops @\$2.50 per stop              45.00

Total      \$ 308.00

Average Cost Per Point      .0111

Average Cost Per 1/2 Gallon      .0222

- (d) Applying the average cost per point shown under (c) above, it is estimated that the unit cost delivered to the stores listed below would approximate the figures shown under column 2 of the following schedule.
- (e) It may well be that Eagle as a dock purchaser may arrange a delivery cost from a different carrier at a lesser cost.
- (f) Stores included in Estimated Cost (item C above):

McComb, Illinois #221

Burlington, Iowa #127

1037a

9/12/68

## SCHEDULE SHOWING DOCK PRICES

(F.O.B. ROCK ISLAND, ILLINOIS)

AND

(1) ESTIMATED STORE DELIVERED COSTS  
USING EAGLE EMPLOYED CONTRACT CARRIER  
OR EAGLE'S OWN TRANSPORT EQUIPMENT

Product	Size	Point Value	Dock Price F.O.B. Rock Island, Illinois	Estimated Store Delivered Cost (1)	Present Prices	
					Quad City Area	Marshall- town
Food Club						
Homo Milk	3.3% B.F.	Gallon	4	\$ .6464	\$ .6784	\$ .7566
Homo Milk	3.3% B.F.	1/2 Gal.	2	.3222	.3382	.3783
2%		Gallon	4	.5964	.6284	.6984
2%		1/2 Gal.	2	.2972	.3132	.3492
Fortified Skim		1/2 Gal.	2	.2483	.2643	.3379
Half & Half		Pint	1	.1847	.1927	.2780
Cottage Cheese		Lb.	1	.2289	.2369	.2407
		2 1/4	1	.4324	.4484	-
Borden Label						
Homo Milk-Glass	3.3% B.F.	Gallon	4	.6365	.6685	.7343
Homo Milk-Paper	3.3% B.F.	Gallon	4	.6564	.6884	.7766
Homo Milk	3.3% B.F.	1/2 Gal.	2	.3272	.3432	.3883
Homo Milk	3.3% B.F.	Quart	1	.1752	.1832	.2125
2%		Gallon	4	.6064	.6384	.7184
2%		1/2 Gal.	2	.3022	.3182	.3592
Chocolate Milk		Quart	1	.2037	.2117	.2350
Chocolate Skim		1/2 Gal.	2	.2882	.3042	-
Fortified Skim		1/2 Gal.	2	.2533	.2693	.3479
Fortified Skim		Quart	1	.1326	.1406	.1974
Buttermilk		1/2 Gal.	2	.2667	.2827	-
Buttermilk		Quart	1	.1363	.1443	.2125
Half & Half		Quart	2	.3657	.3817	-
Half & Half		Pint	1	.1872	.1952	.2830
Whipping Cream		1/2 Pint	1	.1961	.2041	.3131
Sour Cream		16 oz.	2	.3095	.3255	.4002
Sour Cream		8 oz.	1	.1693	.1773	.2463
Sour Half & Half		16 oz.	1	.2406	.2486	-
Sour Cream Dip		8 oz.	1	.1691	.1771	.2905
Cottage Cheese		8 oz.	1	.1310	.1351	.1488
Cottage Cheese		Pound	1	.2314	.2394	.2457
Cottage Cheese		2 Lb.	2	.4374	.4534	.4322
Cottage Cheese-Flav.		Pound	1	.2655	.2733	.2608
Dry Curd Cheese		12 oz.	1	.2747	.2827	.2571
						.1926
						.5093
						.2755
						.2253

(1) Considers stores located in Davenport, Bettendorf, Clinton, Iowa City, Cedar Rapids, Dubuque, Marshalltown, Cedar Falls and Waterloo.

3177

2527



BORDEN DOCK PRICES  
F. O. B. ROCK ISLAND, ILLINOIS

AND

ESTIMATED STORE DELIVERED COSTS  
USING EAGLE EMPLOYED CONTRACT CARRIER  
OR EAGLE'S OWN TRANSPORT EQUIPMENT

- (1) It is up to Eagle as the buyer at Borden's dock to arrange for the transportation to its stores. Contract carriers are available for this purpose.
- (2) We believe that one such contract carrier has the transportation service available on the following basis:
- (a) Delivery Runs - five 3-day runs per week.
- (b) Rates: 37¢ per mile plus a \$2.50 charge per stop plus 2-1/2¢ per case over 100 cases.
- (c) Estimated Cost:
- |                                     |                    |
|-------------------------------------|--------------------|
| 2,650 miles @ 37¢ per mile plus 10% | \$ 1,078.00        |
| 66 stops @ \$2.50 per stop          | 165.00             |
| 600 cases @ 2-1/2¢ per case         | <u>15.00</u>       |
| <b>Total Cost</b>                   | <b>\$ 1,258.00</b> |
| <b>Average Cost Per Points</b>      | <b>.0080</b>       |
| <b>Average Cost Per 1/2 Gallon</b>  | <b>.0160</b>       |
- (d) Applying the average cost per point shown under (c) above, it is estimated that the unit cost delivered to the stores listed below would approximate the figures shown under Column 2 of the following schedule.
- (e) It may well be that Eagle as a dock purchaser may arrange a delivery cost from a different carrier at a lesser cost.
- (f) Stores included in Estimated Cost (Item c above):

#82	#109	#129	#139	#220
#83	#115	#130	#144	#229
#87	#122	#131	#149	
#89	#123	#132	#150	
#105	#128	#138	#157	

10-2



1039a

# SCHEDULE SHOWING DOCK PRICES (F. O. B. WOODSTOCK, ILLINOIS)

AND

## PROJECTED STORE DELIVERED COSTS USING EAGLE EMPLOYED CONTRACT CARRIER OR EAGLE'S OWN TRANSPORT EQUIPMENT

Product	Size	Point Value	Dock Price	Estimated Store Cost (1)	Present Temporary Madison Competitive Prices	Normal Madison Prices
Homo Milk	3.3% B.F.	Gallon	4	\$ .6464	\$ .7000	\$ .7800
Homo Milk	3.3% B.F.	1/2 Gal.	2	.3222	.3400	.3900
2%		Gallon	4	.5964	.6800	.7200
2%		1/2 Gal.	2	.2972	.3100	.3600
Fortified Skim.		1/2 Gal.	2	.2483	.3260	.3260
Half & Half		Pint	1	.1847	.2720	.2720
Cottage Cheese		Lb.	1	.2204	.2845	.2845
				4154	4376	

## Borden Label

Homo Milk-Glass	3.3% B.F.	Gallon	4	.6365	.6800	.7720
Homo Milk-Paper	3.3% B.F.	Gallon	4	.6564	.7000	.7800
Homo Milk	3.3% B.F.	1/2 Gal.	2	.3272	.3400	.3900
Homo Milk	3.3% B.F.	Quart	1	.1752	.2020	.2020
2%		Gallon	4	.6064	.6800	.7200
2%		1/2 Gal.	2	.3022	.3100	.3600
Chocolate Milk		Quart	1	.2037	.2510	.2510
Chocolate Skim		1/2 Gal.	2	.2882	-	-
Fortified Skim		1/2 Gal.	2	.2533	.3260	.3260
Fortified Skim		Quart	1	.1326	.1700	.1700
Buttermilk		1/2 Gal.	2	.2667	.3640	.3640
Buttermilk		Quart	1	.1363	.1880	.1880
Half & Half		Quart	2	.3657	.5290	.5290
Half & Half		Pint	1	.1872	.2720	.2720
Whipping Cream		1/2 Pint	1	.1961	.3420	.3420
Sour Cream		16 oz.	2	.3095	.4690	.4690
Sour Cream		8 oz.	1	.1693	.2430	.2430
Sour Half & Half		16 oz.	1	.2406	.3610	.3610
Sour Cream Dip		8 oz.	1	.1691	.3100	.3100
Cottage Cheese		8 oz.	1/2	.1267	.1772	.1772
Cottage Cheese		Lb.	1	.2229	.2845	.2845
Cottage Cheese		2 Lb.	2	.4204	.5390	.5390
Cottage Cheese-Flav.		Lb.	1	.2568	.3045	.3045
Dry Curd Cheese		12 oz.	1	.2683	.3045	.3045
				3105	3327	-
				2619	2641	-

(1) Applicable to stores located in Madison, Middleton, Stoughton, Ft. Atkinson, Monroe,

Borden Dock Pricef.o.b. Woodstock, Illinois

and

Estimated Store Delivered Costs, using  
Eagle employed contract carrier or  
Eagle's own transport equipment to  
stores located in the Wisconsin area.

- (1) It is up to Eagle as the buyer at Borden's dock to arrange for the transportation to its stores. Contract carriers are available for this purpose.
- (2) We believe that one such contract carrier has the transportation service available on the following basis:
- (a) Delivery Runs - Three 3-day runs per week.
- (b) Rate: \$9.15 per hour plus \$10.00 a day for trailer.

## (c) Estimated Cost:

101 hours @ \$9.15 per hour = \$927.00  
Trailers @ \$10.00 per day 120.00  
Permits, etc. 70.00

Total	\$1117.00
<u>Average Cost per Point</u>	<u>.0111</u>
<u>Average Cost per 1/2 Gallon</u>	<u>.0222</u>

- (d) Applying the average cost per point shown under (c) above, it is estimated that the unit cost delivered to the stores listed below would approximate the figures shown under Column 2 of the following schedule.
- (e) It may well be that Eagle as a dock purchaser may arrange a delivery cost from a different carrier at a lesser cost.
- (f) Stores included in Estimated Costs (item c above)

#55  
#56  
#57  
#58  
#59

#60  
#64  
#65  
#66  
#67

#67  
#71  
#74  
#154  
#226

1041a

RBX22A-U

*Specially prepared*

FOR



1042a

THE BORDEN COMPANY

CHICAGO REGION

1821 S. KILDURN AVENUE

CHICAGO, ILLINOIS 60623

AREA CODE 312 277-6400

November 21, 1968

Mr. Chester Andrews  
Sales Manager - Chicago Division  
National Tea Company  
901 W. Division Street  
Chicago, Illinois 60622

Dear Mr. Andrews:

This opportunity to present to you a National-Borden Fluid Milk Program for your National markets in the National Chicago Division is sincerely appreciated.

We are confident that you will find in this presentation, the kind of product program that stimulates and motivates the attainment of increased sales volume and greater profit levels.

The products produced under the National label will be manufactured and processed in accordance with the high quality standards established by Borden. These products, together with the Borden label milk products supplementing the National line, will be processed and packaged in Borden's most modern production plant located at Woodstock, Illinois. This plant, which is the largest fully automated plant in the world handling a full and complete line of fluid milk items places Borden in the enviable position of being able to handle in the most efficient manner, your Chicago Division requirements. Our plant laboratory control program makes certain the pure and wholesome quality of the products produced and the strict adherence to the various local, State and Federal standards.

You will find attached a series of six (6) schedules which set forth the delivered net prices covering National label and Borden label milk product, the terms and conditions in connection with this proposed program, price adjustment factors covering changes in raw milk costs and data in connection with promotional programming. This latter area establishes the proper coordination of merchandising, advertising and selling programs and concepts which are designed to produce the maximum results for National. In this important field as related to fluid milk products, we have the expertise and experience and to this end we will coordinate all of the aspects to make certain that this program involving the 243 National stores in your Chicago Division and Borden's strategically located plants and distribution locations

Mr. Chester Andrews

1043a

November 21, 1968

C

will function smoothly as a unit and that mutually all parties will achieve the optimum possible from this program.

Certainly not to be overlooked is Borden's advertising program and proven consumer acceptance. Every day we are working, Borden's advertising is also working as a "Silent Salesman" in your stores, helping to create increased consumer interest and impulse sales of dairy products.

We also believe that it is important to give recognition to the location of the various Borden distribution points which provide for greater and more efficient distribution flexibility. In addition to facilities centrally located in Chicago, distribution branches are located at Rockford, Elgin and Libertyville, Illinois, Hammond and South Bend, Indiana, and Grand Rapids, Michigan. This complex of locations provide more service flexibility than is obtainable from any other Chicago area dealer.

A great deal more could be said in regard to our quality, consumer acceptance merchandising, experience and personnel know-how, which would contribute to a successful National-Borden Fluid Milk Program. However, we are sure that you are quite familiar with these plus factors.

We are grateful for your time and consideration of our proposal and request to become a part of your National program. Please rest assured that your confidence in us will be returned many, many times by our people through their work, efforts, enthusiasm and cooperation.

Sincerely,

BORDEN, INC.  
Chicago Region

W. J. Jensen  
General Sales Manager



1044<sup>a</sup>

GENERAL TERMS AND CONDITIONS  
APPLICABLE TO ALL OF THE  
FOLLOWING PRICE SCHEDULES

The unit prices shown on the attached price schedules relate to National and Borden label products and are subject to terms and conditions as herein set forth.

- (A) The unit selling prices for Class I and Class II products as set forth on our price schedules are based on the present net Class I prices as follows:

October, 1968

Woodstock, Illinois (Chicago Federal Order)

\$5.70 Class I Super Pool  
Prices Per Cwt.

\$4.28 Class II Cost Per

Michigan Area (Michigan Federal Order)

\$6.20 Class I Price Per

\$4.38 Class II Cost Per

The unit selling prices set forth on our price schedules will be subject monthly to automatic adjustments up or down in accordance with the changes occurring in the Class I and Class II announced milk prices under the Federal Order Program, a negotiated Class I Super Pool Price, in accordance with cost change factor set forth on our Price Adjustment Schedule.

- (B) In the event the Class I milk price established under the provisions of the Federal Order in effect or a negotiated Class I milk price establishes a change in the presently recognized butterfat and skim milk values, the effect of such change will be automatically reflected where applicable in the unit prices as set forth on our price schedule.

(C) Ordering of products.

- (1) Products will be pre-ordered at least two (2) days prior to the date of delivery.
- (2) Borden personnel will assist in the formulation of this program and will work with National personnel during the introductory period in the various phases of ordering and scheduling.
- (D) To provide the most efficient delivery system, the cooperation of store personnel is necessary to conserve driver and truck time. Deliveries will be made inside the back door of your stores.

1046<sup>a</sup>

(E) Store personnel must place empty milk cases and bottles at designated points for pick-up by the driver.

(F) Code Dates.

- (1) Products will be clearly coded on the gable of the milk items and on the bottom of all bucket products.
- (2) All products are coded with an expiration date.
- (3) Code date requirements and expirations will be explained at local levels as requested.

(G) Credit for Product Returns.

- (1) Credit for product returns shall only consider faulty containers at the time of delivery.

(H) Under this program private label purchases do not include the performance of advertising, store promotions, in-store material, product promotions, etc. on the part of Borden.

(I) Containers.

The unit selling prices shown on all price schedules are related to Borden's present unit purchase cost of containers. Any changes in the purchase cost of containers will be automatically reflected in the unit selling prices.

(J) Any special deliveries (other than regular schedule) will be subject to a \$10.00 delivery charge.

(K) Changes occurring in the cost of labor as a result of union contract changes, changes in the cost of materials and supplies and other applicable costs will be considered as the basis for an adjustment, up or down, to the unit selling prices set forth on all price schedules attached hereto.

(L) Invoices covering products purchased will be made on a weekly basis with payment due within ten (10) days from billing date.

## PRICE ADJUSTMENT SCHEDULE

G

## COVERING RAW MILK COST CHANGES

## Class I Milk Products

If Class I Milk Cost  
Increases or Decreases  
Per Cwt.

Selling Prices  
Will Increase or  
Decrease Per Point

If Class I Milk  
Increased or Decreases  
Per Cwt.

Selling Prices  
Will Increase or  
Decrease Per

\$ .01  
.02  
.03  
.04  
.05  
.06  
.07  
.08  
.09  
.10  
.11  
.12  
.13  
.14  
.15  
.16  
.17  
.18  
.19  
.20  
.21  
.22  
.23

\$ .0002  
.0004  
.0007  
.0009  
.0010  
.0013  
.0015  
.0017  
.0019  
.0021  
.0024  
.0026  
.0028  
.0030  
.0033  
.0035  
.0037  
.0039  
.0041  
.0043  
.0045  
.0048  
.0050

\$ .24  
.25  
.26  
.27  
.28  
.29  
.30  
.31  
.32  
.33  
.34  
.35  
.36  
.37  
.38  
.39  
.40  
.41  
.42  
.43  
.44  
.45  
.46

\$ .0052  
.0054  
.0056  
.0059  
.0061  
.0063  
.0065  
.0067  
.0069  
.0072  
.0074  
.0076  
.0078  
.0080  
.0082  
.0085  
.0087  
.0089  
.0091  
.0093  
.0095  
.0098  
.0100

## Class II Cottage Cheese

If Class II Milk Cost  
Increases or Decreases  
Per Cwt.

Selling Prices  
Will Increase or  
Decrease Per Pound

\$ .01

\$ .0005

BORDEN DROP DELIVERY PRICE SCHEDULES

- (1) Chicago and Calumet Areas
- (2) Rockford and Freeport, Illinois Areas
- (3) Libertyville and Elgin, Illinois Areas
- (4) Central-Illinois Areas
- (5) South Bend-Michigan City Areas
- (6) Benton Harbor, Kalamazoo, Battle Creek  
and Lansing Areas



**1049a**  
**BORDEN, INC.**  
 Chicago Region

**BORDEN WHOLESALE DELIVERY PRICES \***  
**SIX (6) DAY DROP DELIVERY PROGRAM**  
**CHICAGO AND CALUMET AREA**

Point Value	Product National Label	Size & Type	Net Price
4	Homo V. D. Milk	Gallon - Paper	\$ .7716
2	Homo V. D. Milk	1/2 Gal. - Paper	.3828
	<u>Borden Label</u>		
4	Homo V. D. Milk	Gallon - Glass	.7440
4	Homo V. D. Milk	Gallon - Paper	.7816
2	Homo V. D. Milk	1/2 Gal. - Paper	.3878
1	Homo V. D. Milk	Quart - Paper	.2089
4	Homo V. D. Milk	Gallon - Paper	.7396
2	2% Chocolate Milk	1/2 Gal. - Paper	.3668
1	2% Shake	Quart - Paper	.2555
1/2	Chocolate Skim	1/2 Pint - Paper	.0815
2	Fortified Skim	1/2 Gal. - Paper	.3697
2	Fortified Skim	1/2 Gal. - Paper	.3352
1	Buttermilk	Quart - Paper	.1722
2	Buttermilk	1/2 Gal. - Paper	.3460
1	Sour Cream	Quart - Paper	.1759
2	Sour Cream	16 oz. Carton	.3834
1	Sour Half & Half	8 oz. Carton	.2063
1	Half & Half	Pint - Paper	.3424
2	Half & Half	Quart - Paper	.4557
1	Whipping Cream	Pint - Paper	.2314
1	Cottage Cheese	1/2 Pint - Paper	.2317
1/2	Cottage Cheese	8 oz. Carton	.1778
1	Cottage Cheese	16 oz. Carton	.2781
2	Cottage Cheese	32 oz. Carton	.5304
1	Flavored Cottage Cheese	16 oz. Carton	.3031
1	Dry Cheese	12 oz. Carton	.3039-.35
1	Sour Cream Dips	8 oz. Carton	.2092
1	Yogurt, Plain & Vanilla	8 oz. Carton	.1737
1	Yogurt, Flavored	8 oz. Carton	.2017
1	Egg Nog	Quart	.3896

\*The above prices are net and subject to no further discounts. The homo and 2% paper gallon container prices represent the inclusion of the container handle. These prices are subject to the attached terms and conditions, applicable to stores located as follows:

NATIONAL TEA COMPANYChicago Area - 6 Day Delivery

<u>Store No.</u>	<u>Address</u>	<u>Town</u>	<u>Store No.</u>	<u>Address</u>	<u>Town</u>
251	1055 Bryn Mawr	Chicago	103	3244 Lake Avenue	Wilmette
252	7614 N. Paulina St.	Chicago	109	1146 Chicago Avenue	Evanston
253	1043 W. Granville	Chicago	117	333 Ridge Road	Wilmette
502	2841 Touhy Avenue	Chicago	118	636 Deerfield Road	Deerfield
513	740 W. Diversey	Chicago	120	430 Ashbury	Evanston
514	1521 W. Belmont	Chicago	124	838 Dodge Avenue	Evanston
534	1440 W. Devon	Chicago	137	3808 Dempster	Skokie
537	2211 W. Devon	Chicago	261	716 Waukegan	Deerfield
555	1520 W. Fullerton	Chicago	262	305 Happ Road	Northfield
575	2480 N. Clark	Chicago	263	341 Hazel	Glencoe
605	7238 N. Damen	Chicago	122	1155 Lee Street	Des Plaines
618	3637 N. Southport	Chicago	147	2745 Mannheim	Franklin Park
640	3646 N. Broadway	Chicago	148	6311 W. North Avenue	Oak Park
644	4445 N. Sheridan	Chicago	149	219 W. Main Street	Bensenville
645	4812 N. Sheridan	Chicago	154	121 Grand Avenue	Melrose Park
651	4055 N. Broadway	Chicago	165	1047 York Road	Bensenville
677	2127 W. Lawrence	Chicago	169	3121 N. Thatcher	River Grove
678	1964 W. Foster	Chicago	626	4401 W. Armitage	Chicago
256	1120 N. State	Chicago	648	761 N. Laramie	Chicago
501	2722 N. Milwaukee	Chicago	662	330 N. Central	Chicago
503	1615 N. Sedgwick	Chicago	663	5719 W. Diversey	Chicago
512	1600 W. Superior	Chicago	664	4441 W. Diversey	Chicago
556	2274 N. Milwaukee	Chicago	665	5140 W. Diversey	Chicago
558	3235 N. Springfield	Chicago	689	6725 W. Belmont	Chicago
559	2010 N. Damen	Chicago	694	1705 N. Harlem	Chicago
560	2140 N. Western	Chicago	703	9310 W. Irving Park	Schiller Park
563	2301 W. Division	Chicago	107	7118 Golf Road	Morton Grove
584	2153 W. Roscoe	Chicago	108	290 Golf Mill Center	Niles
588	3104 W. Armitage	Chicago	119	1042 Northwest Hwy.	Park Ridge
622	2344 W. Chicago	Chicago	130	7201 Dempster	Niles
627	2650 W. Division	Chicago	136	5314 N. Lincoln Ave.	Skokie
652	4349 N. Damen	Chicago	159	4115 N. Harlem	Norridge
654	3937 N. Ashland	Chicago	161	5148 N. Harlem	Harwood Hts.
658	4112 N. Lincoln	Chicago	254	6133 N. Lincoln	Chicago
100	122 Green Bay Road	Winnetka	264	3950 W. Devon	Lincolnwood
101	1409 Waukegan Road	Glenview	504	6785 Northwest Hwy.	Chicago
102	1108 Central Avenue	Wilmette	532	4751 N. Elston	Chicago

1051a

NATIONAL TEA COMPANYChicago Area -- 6 Day Delivery

<u>Store No.</u>	<u>Address</u>	<u>Town</u>	<u>Store No.</u>	<u>Address</u>	<u>Town</u>
603	4242 N. Central	Chicago	447	637 East Ridge	Gary
609	6310 N. Nagle	Chicago	448	6105 East Dunes Hwy.	Gary
610	5330 N. Milwaukee	Chicago	302	159th & Stanley	Calumet City
666	3301 W. Lawrence	Chicago	396	501 E. Pennsylvania	Dolton
668	4343 N. Kedzie	Chicago	398	17829 Burnham	Lansing
706	279 Lawrencewood	Niles	430	8401 Wicker Park	Highland, Ind.
197	5840 W. 35th Street	Cicero	453	116 Sibley Street	Hammond
522	213 N. Pulaski	Chicago	454	167th & Indianapolis	Hammond
671	4905 W. Madison	Chicago	858	2325 E. 95th Street	Chicago
867	6611 S. Halsted	Chicago	167	3720 West 95th St.	Evergreen Park
869	5135 S. Damen Avenue	Chicago	170	4060 Southwest Hwy.	Homewood
920	5300 S. Halsted St.	Chicago	172	4720 West 103rd Street	Oaklawn
929	5346 S. Ashland	Chicago	176	12637 S. Ashland	Calumet Park
955	2101 W. Cermak Road	Chicago	177	147th & Cicero	Midlothian
958	2321 S. Kedzie Avenue	Chicago	300	1919 Bremerton	E. Hazelcrest
971	1918 W. 35th Street	Chicago	304	16720 S. Oak Park	Tinley Park
976	4023 S. Archer Avenue	Chicago	395	276 W. 148th Place	Harvey
977	2623 S. Pulaski Road	Chicago	397	2959 W. 159th Street	Markham
986	3307 W. 63rd Street	Chicago	850	115th & Western	Chicago
988	6220 S. Damen	Chicago	851	801 West 119th St.	Chicago
997	2514 W. 47th Street	Chicago	854	11525 S. State St.	Chicago
1003	4666 S. Halsted	Chicago	857	10815 S. Halsted	Chicago
860	9241 S. Ashland	Chicago		90th & Halsted	Chicago
861	8325 S. Ashland	Chicago	146	12 East North Ave.	Northlake
871	7443 S. Racine	Chicago	151	1706 N. Main Street	Wheaton
876	7531 S. Vincennes	Chicago	152	915 Roosevelt	Wheaton
885	2346 E. 79th Street	Chicago	153	607 W. North Avenue	Villa Park
886	2625 W. 79th Street	Chicago	155	44 South Villa	Villa Park
887	1312 E. 79th Street	Chicago	158	837 Westmore	Lombard
892	8558 S. Cottage Grove	Chicago	164	530 North Avenue	Glendale Hts.
893	1220 E. 87th Street	Chicago	166	570 Crescent Blvd.	Glen Ellyn
894	6330 S. Stony Island	Chicago	190	942 S. York Road	Elmhurst
896	7162 S. Exchange	Chicago	751	110 W. North Avenue	Elmhurst
898	7739 S. Exchange	Chicago	753	401 Main Street	Lombard
941	1346 E. 53rd Street	Chicago	758	430 Addison Road	Addison
440	4369 W. 5th Avenue	Gary	179	63rd & Main Street	Downers Grove
441	2500 Central	East Gary	192	1101 Ogden	Downers Grove

1X

NATIONAL TEA COMPANYChicago Area - 6 Day Delivery

<u>Store No.</u>	<u>Address</u>	<u>Town</u>	<u>Store No.</u>	<u>Address</u>	<u>Town</u>
199	5329 Main Street	Downers Grove	755	325 N. Mannheim Rd.	Bellwood
303	561 Cass Street	Joliet	757	6226 W. Roosevelt	Oak Park
311	950 Jefferson	Joliet			
327	130 N. Jefferson	Naperville			
754	1020 Maple	Lisle			
123	2995 Kirchoff Road	Rolling Meadows			
157	321 W. Northwest Hwy.	Palatine			
162	17 South Dunton	Arlington Hts.			
702	241 Rand Road	Mt. Prospect			
704	212 W. Northwest Hwy.	Arlington Hts.			
705	Golf & Rosell Roads	Hoffman Estates			
707	1010 S. Elmhurst Road	Mt. Prospect			
168	1114 S. Harlem Ave.	Worth			
171	8821 West 87th Street	Hickory Hills			
173	5525 West 87th Street	Oaklawn			
175	8749 Ridgeland	Oaklawn			
173	55th & Plainfield	LaGrange			
185	7546 W. 63rd Street	Argo			
188	419 LaGrange Road	LaGrange			
189	Grant Square	Hinsdale			
681	8045 S. Cicero (Scottsdale)	Chicago			
688	76th & Cicero (Ford City)	Chicago			
989	6201 S. Pulaski	Chicago			
990	6150 W. 63rd Street	Chicago			
994	6301 W. 55th Street	Chicago			
140	25 W. Lake Street	Oak Park			
144	1708 Main Street	Melrose Park			
150	21st & Roosevelt	Broadview			
156	820 S. Oak Park Ave.	Oak Park			
181	4424 W. Prescott	Lyons			
184	4926 W. Cermak Road	Cicero			
186	3743 S. Harlem	Berwyn			
187	3310 S. Oak Park Ave.	Berwyn			
195	2120 S. Mannheim	Westchester			
196	5525 St. Charles Rd.	Berkeley			
521	3635 W. Chicago Ave.	Chicago			
752	215 N. Harlem	Forest Park			



BORDEN WHOLESALE DELIVERY PRICES \*  
THREE (3) DAY DROP DELIVERY PROGRAM  
WESTERN MICHIGAN

Point Value	Product	Size	Net Prices
<u>National Label</u>			
4	Homo V. D. Milk	Gallon - Paper	\$ .7510
2	Homo V. D. Milk	1/2 Gallon - Paper	.3755
<u>Borden Label</u>			
4	Homo V. D. Milk	Gallon - Paper	.7610
2	Homo V. D. Milk	1/2 Gallon - Paper	.3805
1	Homo V. D. Milk	Quart - Paper	.2070
4	Hi-Pro	Gallon - Paper	.7060
2	Hi-Pro	1/2 Gallon - Paper	.3580
1	Chocolate Milk	Quart - Paper	.2340
2	Chocolate Skim	1/2 Gallon - Paper	.4230
2	Fortified Skim	1/2 Gallon - Paper	.2930
1	Fortified Skim	Quart - Paper	.1650
2	Buttermilk	1/2 Gallon - Paper	.3690
1	Buttermilk	Quart - Paper	.1910
2	Sour Cream	16 oz. Carton	.3400
1	Sour Cream	8 oz. Carton	.1840
2	Half & Half	Quart - Paper	.4070
1	Half & Half	Pint - Paper	.2170
1/2	Whipping Cream	1/2 Pint - Paper	.2600
1	Cottage Cheese	16 oz. Carton	.2550
2	Cottage Cheese	30 oz. Carton	.4640
1	Flavored Cottage Cheese	16 oz. Carton	.2750
1	Dry Cheese	12 oz.	.2550
1	Sour Cream Dips	8 oz.	.2190
1	Yogurt, Plain & Vanilla	8 oz. Carton	.1810
1	Yogurt, Flavored	8 oz. Carton	.2010

\* The above prices are net and subject to no further discounts.  
These prices are subject to the terms and conditions as set forth, applicable to stores located as follows:



NATIONAL TEA COMPANYRockford Area - 3 Day Delivery

<u>Store No.</u>	<u>Address</u>	<u>Town</u>
355	121-33 W. Lincoln Hwy.	DeKalb
357	N.W. Corner of State & California	Sycamore

1055a

BORDEN, INC.  
Chicago RegionBORDEN WHOLESALE DELIVERY PRICES \*  
FIVE (5) DAY TRAILER DROP DELIVERY PROGRAM  
LIBERTYVILLE & ELGIN, ILLINOIS

Point Value	Product	Size	Net Prices
<hr/>			
National Label			
4	Homo V. D. Milk	Gallon - Paper	\$ .7620
2	Homo V. D. Milk	1/2 Gallon - Paper	.3780
<hr/>			
Borden Label			
4	Homo V. D. Milk	Gallon - Glass	\$ .7344
4	Homo V. D. Milk	Gallon - Paper	.7720
2	Homo V. D. Milk	1/2 Gallon - Paper	.3830
1	Homo V. D. Milk	Quart - Paper	.2065
4	Homo V. D. Milk	Gallon - Paper	.7300
2	2%	1/2 Gallon - Paper	.3620
2	2%	Quart - Paper	.2531
1	Chocolate Milk	1/2 Pint - Paper	.0803
1 1/2	Chocolate Skim	1/2 Gallon - Paper	.3649
2	Fortified Skim	1/2 Gallon - Paper	.3304
2	Fortified Skim	Quart - Paper	.1698
1	Buttermilk	1/2 Gallon - Paper	.3412
2	Buttermilk	Quart - Paper	.1735
1	Sour Cream	16 oz. Carton	.3786
2	Sour Cream	8 oz. Carton	.2039
1	Sour Half & Half	Pints - Paper	.3376
1	Half & Half	Quart - Paper	.4509
2	Half & Half	Pint - Paper	.2290
1	Whipping Cream	1/2 Pint - Paper	.2293
1 1/2	Cottage Cheese	8 oz. Carton	.1766
1 1/2	Cottage Cheese	16 oz. Carton	.2757
1	Cottage Cheese	32 oz. Carton	.5256
2	Cottage Cheese	16 oz. Carton	.3007
1	Flavored Cottage Cheese	12 oz.	.3031
1	Dry Cheese	8 oz.	.2068
1	Sour Cream Dips	8 oz. Carton	.1713
1	Yogurt, Plain & Vanilla	8 oz. Carton	.1993
1	Yogurt, Flavored	8 oz. Carton	.3872
1	Egg Nog	Quarts	

\* The above prices are net and subject to no further discounts. The homo and 2% paper gallon containers represent the inclusion of the containers handles.

These prices are subject to the terms and conditions as set forth, applicable to store located as follows:

1056a

NATIONAL TEA COMPANYElgin-Libertyville - 5 Day Delivery

<u>Store No.</u>	<u>Address</u>	<u>Town</u>
104	1204 W. 21st Street	Zion
110	516 N. Western Avenue	Lake Forest
112	2225 Belvidere Road	Waukegan
115	1501 Lewis Street	Waukegan
114	Route 134	Round Lake
319	Route 14 & Silver Lake Rd.	Cary
320	350 Virginia Avenue	Crystal Lake
323	220 Jefferson	Woodstock
325	663 Villa	Elgin
326	611 Dundee Road	Elgin
330	3750 West Elm Street	McHenry
347	160 E. Summer Street	Harvard
349	135 W. Northwest Hwy.	Barrington
701	17 Lakeland Plaza	Fox Lake
322	559 Main Street	West Chicago
335	716 West State Street	Geneva
332	380 Galena Boulevard	Aurora
337	30 North Root Street	Aurora
1002	1272 Lake Street	Aurora
126	425 Liberty	Wauconda
128	1900 S. Wolf Road	Wheeling
129	834 W. Dundee Road	Wheeling
135	120 North Milwaukee	Libertyville
142	61 Center Street	Grayslake
163	450 Lake Street	Mundeloin

**BORDEN WHOLESALE DELIVERY PRICES \***  
**THREE (3) DAY DROP DELIVERY PROGRAM**  
**WESTERN MICHIGAN**

Unit	Product	Size	Net Price
Price			
	<b>Additional Label</b>		
4	Homo V. D. Milk	Gallon - Paper	\$ .7510
2	Homo V. D. Milk	1/2 Gallon - Paper	.3755
	<b>Borden Label</b>		
4	Homo V. D. Milk	Gallon - Paper	.7610
2	Homo V. D. Milk	1/2 Gallon - Paper	.3805
1	Homo V. D. Milk	Quart - Paper	.2070
4	Hi-Pro	Gallon - Paper	.7060
2	Hi-Pro	1/2 Gallon - Paper	.3580
1	Chocolate Milk	Quart - Paper	.2340
2	Chocolate Skim	1/2 Gallon - Paper	.4230
2	Fortified Skim	1/2 Gallon - Paper	.2930
1	Fortified Skim	Quart - Paper	.1650
2	Buttermilk	1/2 Gallon - Paper	.3690
1	Buttermilk	Quart - Paper	.1910
2	Sour Cream	16 oz. Carton	.3400
1	Sour Cream	8 oz. Carton	.1840
2	Half & Half	Quart - Paper	.4070
1	Half & Half	Pint - Paper	.2170
1/2	Whipping Cream	1/2 Pint - Paper	.2600
1	Cottage Cheese	16 oz. Carton	.2550
2	Cottage Cheese	30 oz. Carton	.4640
1	Flavored Cottage Cheese	16 oz. Carton	.2750
1	Dry Cheese	12 oz.	.2550
1	Sour Cream Dips	8 oz.	.2190
1	Yogurt, Plain & Vanilla	8 oz. Carton	.1810
1	Yogurt, Flavored	8 oz. Carton	.2010

\* The above prices are net and subject to no further discounts.  
 These prices are subject to the terms and conditions as set forth, applicable to  
 stores located as follows:

NATIONAL TEA COMPANYMichigan - 3 Day Delivery

<u>Store No.</u>	<u>Address</u>	<u>Town</u>
5	1017 West Sagnaw	Lansing
30	3013 Oakland Drive	Kalamazoo
31	3520 East Main Street	Kalamazoo
35	124 East Green	Marshall
43	2384 West Michigan	Battle Creek
50	1601 South Burdick	Kalamazoo
53	425 West Van Buren	Battle Creek
54	540 Main Street	Battle Creek
57	24 East Columbia	Battle Creek
58	5125 Portage	Kalamazoo



**BORDEN WHOLESALE DELIVERY PRICES \***  
**THREE (3) DAY TRAILER DROP DELIVERY PROGRAM**  
**SOUTH BEND - MICHIGAN CITY AREA**

And

**CENTRAL ILLINOIS AREA**

POINT VALUE	PRODUCT	SIZE	NET PRICES
4	Homo V. D. Milk	Gallon	\$ .7320
2	Homo V. D. Milk	1/2 Gallon	.3630
Borden Label			
4	Homo V. D. Milk	Gallon, Glass	.7044
4	Homo V. D. Milk	Gallon, Paper	.7420
2	Homo V. D. Milk	1/2 Gallon	.3680
1	Homo V. D. Milk	Quart	.1990
4	Homo V. D. Milk	Gallon	.7000
2	2%	1/2 Gallon	.3470
1	Chocolate Milk	Quart	.2356
1/2	Shake	1/2 Pint	.0791
2	Chocolate Skim	1/2 Gallon	.3499
2	Fortified Skim	1/2 Gallon	.3154
1	Fortified Skim	Quart	.1623
2	Buttermilk	1/2 Gallon	.3262
1	Buttermilk	Quart	.1660
2	Sour Cream	16 oz.	.3636
1	Sour Cream	8 oz.	.1964
1	Sour Half & Half	Pint	.3301
2	Half & Half	Quart	.4359
1	Half & Half	Pint	.2215
1	Whipping Cream	1/2 Pint	.2218
1/2	Cottage Cheese	8 oz.	.1729
1	Cottage Cheese	16 oz.	.2682
2	Cottage Cheese	32 oz.	.5106
1	Flavored Cottage Cheese	16 oz.	.2932
1	Dry Cheese	12 oz.	.2956
1	Sour Cream Dips	8 oz.	.1993
1	Yogurt, Plain and Vanilla	8 oz.	.1638
1	Yogurt, Flavored	8 oz.	.1918
1	Egg Nog	Quart	.3697

\*The above prices are net and subject to no further discount. The Homo and 2% paper gallon container prices represent the inclusion of the container handle. These prices are subject to the terms and conditions as set forth, applicable to stores located as follows:

NATIONAL TEA COMPANYSouth Bend - 3 Day Delivery

<u>Store No.</u>	<u>Address</u>	<u>Town</u>
19	400 Broadway	Niles, Mich.
431	609 Lincolnway East	LaPorte, Ind.
432	320 Miracle Lane	Mishawaka
434	52101 Dixieway North	South Bend
436	1935 Lincolnway East	South Bend
438	2303 East Michigan	Michigan City
439	3231 Franklin	Michigan City
459	152 West Indiana	Valparaiso
457	219 S. Main Street	Crown Point
21	815 Main Street	St. Joseph, Mich.
27	325 East Main Street	Benton Harbor
51	1823 M-139	Benton Harbor

NATIONAL TEA COMPANYCentral-Illinois - 3 Day Delivery

<u>Store No.</u>	<u>Address</u>	<u>Town</u>
313	393 S. Dearborn	Kankakee
314	1717 E. Maple	Kankakee
317	36 Meadowview Center	Kankakee
394	Sauk Terrace & Torrence	Saukville
348	219 East Grant Hwy.	Monee
315	901 Clinton	Ottawa
318	212 Pratt Street	Streator
329	215 East Washington	Morris

1061a

1062a

8711 Healdwade  
Detroit, Michigan

K BX 23A

AUTHORIZED ITEMS FOR DIRECT DELIVERY - DATE: November 13, 1957  
FROM:

DELIVERED TO:

STORE NAME: K-Mart Foods #54

STREET ADDRESS: 7828 Indianapolis Blvd.

CITY: Hammond, Indiana

BILL TO: Allied Discount Foods

Div. of Allied Supermarkets

P.O. Box 356 R.P.A.

Detroit, Michigan

ATTENTION: Accounting Dept.

VENDOR: The Borden Company

STREET ADDRESS: 1821 S. Kilbourn Ave

CITY: Chicago, Illinois

PHONE NUMBER: CR 7-6400

REPRESENTATIVE: W. J. Jensen

☐ NEW LISTING

DISTRICT MGR. APPROVAL

☐ REPLACEMENT FORM  
(Price Change Etc.)

	ITEM	PACK	SIZE	REG. COST	A.O.F. COST	REG. RET.	A.O.F. RET.
1	Homogenized Milk	Paper	Gal.		.7320		
2	Homogenized Milk (Country Kitchen)	"	1/2Gal.		.3750		
3	Homogenized Milk (Borden's)	"	1/2Gal.		.3750		
4	Homogenized Milk	"	Qts.		.2020		
5	2% Homo Modified Skim Milk	"	Gal.		.7280		
6	2% Homo Modified Skim Milk	"	1/2Gal.		.3540		
7	Buttermilk	"	1/2Gal.		.3750		
8	Buttermilk	"	Qts.		.2020		
9	Skim Milk	"	1/2Gal.		.3430		
10	Skim Milk	"	Qts.		.1790		
11	Dutch Chocolate Milk	"	Qts.		.250		
12	Dutch Chocolate Skim Milk	"	1/2Gal.		.3640		
13	Half & Half	"	Pts.		.2910		
14	Whipping Cream	"	1/2Pts.		.3120		

Please notify this office and local store manager at once on all cost advances and declines.

NOTE: No Payment will be made on items not listed on these forms.

DISCOUNTS &amp; ALLOWANCES: Net X 5% discount on all items

PLEASE INDICATE HOW DISCOUNTS &amp; ALLOWANCES WILL BE GIVEN. CHECK ONE OF THE FOLLOWING:

Deducted from Invoice ☐Deducted from Statement ☐Paid by separate Check ☐

If paid by separate check, indicate:

Check will be issued automatically ☐ Monthly

TERMS: % DAYS NET: XXXX 30 d2

161

1063a-1064a

ALLIED DISCOUNT FOODS  
8711 Beaubien  
Detroit, Michigan

B

AUTHORIZED ITEMS FOR DIRECT DELIVERY - DATE: November 13, 1967  
FROM:

DELIVERED TO:

STORE NAME: K-Mart Foods #54

STREET ADDRESS: 7828 Indianapolis Blvd.

CITY: Hammond, Indiana

BILL TO: Allied Discount Foods

Div. of Allied Supermarkets

P.O. Box 356 R.P.A.

Detroit, Michigan

ATTENTION: Accounting Dept.

VENDOR: The Borden Company

STREET ADDRESS: 1821 S. Kilbourn Av

CITY: Chicago, Illinois

PHONE NUMBER: CR 7-6400

REPRESENTATIVE: W. J. Jensen

☐ NEW LISTING

DISTRICT MGR. APPROVAL

☐ REPLACEMENT FORM  
(Price Change, Etc.)

	ITEM	PACK	SIZE	REG. COST	A.O.F. COST	REG. RET.	A.O. RET.
1	Sour Half & Half	Plastic	16 oz.		.3400		
2	Sour Cream	"	16 oz.		.5140		
3	Sour Cream	"	8 oz.		.2700		
4	Sour Cream Dips	"	8 oz.		.3070		
5	Borden's Swiss Yogurt	"	8 oz.		.2670		
6	Creamed Cottage Cheese	"	2 lb.		.5000		
7	Creamed Cottage Cheese (Plain)	"	16 oz.		.2670		
8	Creamed Cottage Cheese (Flavored)	"	16 oz.		.2670		
9	Creamed Cottage Cheese	"	8 oz.		.1600		
10	Triple Whip	Can	7 oz.		.430		
11	Egg Nog	Paper	Qts.		.45		
12							
13							
14							

Please notify this office and local store manager at once on all cost advances and declines.

NOTE: No Payment will be made on items not listed on these forms.

DISCOUNTS &amp; ALLOWANCES: Net 5% discount on all items

PLEASE INDICATE HOW DISCOUNTS &amp; ALLOWANCES WILL BE GIVEN. CHECK ONE OF THE FOLLOWING:

Deducted from Invoice ☐Deducted from Statement ☐Paid by separate Check ☒ XIf paid by separate check, indicate:  
Check will be issued automatically ☐ MonthlyTERMS: % \_\_\_\_\_ DAYS NET: ~~XX~~ 30 da

1/67



## Initial Decision

### TABLE OF CONTENTS

	PAGE
Preliminary Statement .....	1
Findings of Fact .....	3
A. A&P's Identity and Business Nature .....	3
B. Borden's Identity and Business Nature .....	6
C. Commerce .....	7
D. Negotiations .....	9
E. Grade and Quality .....	19
F. Contemporaneous Sale .....	19
G. Discrimination .....	20
I. Gary-Hammond and Valparaiso Areas ....	20
II. The Chicago and Suburbs Area .....	23
H. Injury to Competition .....	25
I. A&P's Inducement or Receipt of Borden's Private Label Pricing .....	27
J. A&P's Knowledge That Borden's Bid Was Not Cost Justified .....	27
K. The Bowman and Borden Competitive Bids ....	31
L. Cost Justification .....	33
A&P's Factual and Legal Contentions .....	34
A. Count I .....	34
B. Count II .....	38
I. The Discrimination .....	38
II. The Representativeness of the Stores .....	39
III. Knowledge .....	42
IV. Meeting Competition .....	44
V. Cost Justification .....	45
a. Attacks Upon Malone's Calculations ..	45
b. Burden of Proof .....	47

*Initial Decision*

	PAGE
e. Havemeyer's Cost Studies .....	49
i. Delivery Costs .....	50
ii. Processing Costs .....	53
iii. Havemeyer's Unfamiliarity .....	54
iv. Indiana Irregularities .....	56
v. Branch Selling Expense .....	57
vi. Failure of Classification .....	58
vii. Countervailing Costs .....	60
viii. General Selling and Administra- tive Costs .....	61
ix. Credit Loss .....	62
x. Advertising Expense .....	63
xi. The Availability Argument .....	63
xii. Conclusion .....	65
VI. The Borden Defense .....	65
VII. Commerce and By-Products .....	66
C. Count III .....	67
I. Complaint Counsel's Contentions .....	70
II. Respondents' Reply .....	72
III. Conclusion .....	75
D. The Denial of Due Process .....	78
I. A&P's Contentions .....	78
a. The Unavailability of Documents .....	79
b. The Unavailability of Witnesses .....	81
Conclusions of Law .....	85
The Remedy .....	86
Order .....	89
Appendix .....	i

*Initial Decision*

[1]

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 8866

---

In the Matter of

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,  
a corporation, and  
BORDEN, INC., a corporation.

---

INITIAL DECISION

Harry R. Hinkes, Administrative Law Judge

John J. Mathias, Edwin R. Soeffing and Andrew G. Stone,  
Esquires, Counsel Supporting the Complaint

Cahill Gordon & Reindel,

Attorneys for Respondent, The Great Atlantic & Pacific  
Tea Company, Inc., New York, New York

Denis McInerney, Raymond L. Falls, Jr., Thomas F. Cur-  
nin, Joseph P. Foley and Ira J. Dembrow, Esquires, Of  
Counsel.

H. Blair White, Theodore N. Miller and Nathan P. Eimer,  
Esquires, Attorneys for Respondent, Borden, Inc., Chi-  
cago, Illinois,

Sidley & Austin, Chicago, Illinois and

Walter W. Kocher, Esquire, Columbus, Ohio, Of Counsel.

PRELIMINARY STATEMENT

This proceeding began with the issuance of a complaint by the Federal Trade Commission on October 8, 1971, against The Great Atlantic & Pacific Tea Company, Inc., (hereafter A&P) and Borden, Inc., (hereafter Borden). The

*Initial Decision*

complaint contains three counts. Count I of the complaint charges that A&P violated Section 5 of the Federal Trade Commission Act as well as the policy of Section 2 of the Clayton Act as amended, in the manner and method by which it negotiated [2] its price on private label milk.<sup>1</sup> The complaint charges that when Borden tendered its final offer to A&P it informed A&P that the offer was being granted for the purpose of meeting competition but that A&P accepted the offer with knowledge that Borden had granted a substantially lower price than that offered by the only other bidder and without notifying Borden of this fact.

Count II of the complaint charges A&P with a violation of Subsection (f) of Section 2 of the Clayton Act as amended by knowingly inducing or receiving discriminations in price which are prohibited by Subsection (a) of Section 2 of the Clayton Act as amended, from its supplier Borden.

Count III of the complaint charges both Borden and A&P with a violation of Section 5 of the Federal Trade Commission Act by a course of conduct constituting a combination between them which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products.

All of the violations alleged in the complaint center about the private label supply agreement entered into between respondents A&P and Borden under which Borden began private label sales to A&P's Chicago Unit's stores on or about November 1, 1965. Such sales continued under the agreement until February 1972. The agreement covered sales of milk and dairy products to more than 200 A&P stores located in a multistate area including portions of Illinois and Indiana.

---

<sup>1</sup> Prehearing conference of May 15, 1973 (Tr. p. 5).

*Initial Decision*

The illegal conduct described in Count I is alleged to have occurred during A&P's course of dealings with Borden leading up to the agreement, which dealings took place from late 1964 up until November 1, 1965. The illegal conduct described in Count II is alleged to have occurred during the same period and also during a later time period when the agreement was in force. In connection with the illegal combination alleged in Count III, complaint counsel limited their main period of proof to include November 1, 1964 through December 31, 1968.

[3] After a number of prehearing conferences, hearings commenced on June 11, 1973 and continued with short interruptions until March 27, 1975 when the record was closed for further evidence.

Not only is this case one of great complexity but its dimensions as well are extraordinary. In addition to the more than 110 hearing days expended, the scores of witnesses heard, the stipulations received, the hundreds of exhibits aggregating about 10,000 pages received, and the more than 11,000 transcript pages of testimony and argument, counsel for the parties have submitted for my consideration briefs totaling more than 2,000 pages which, considering the limited time given for such endeavor, are most commendable.

Any motions not heretofore or herein specifically ruled upon, either directly or by necessary effect of the conclusions in this initial decision, are hereby denied.

The proposed findings, conclusions and briefs as submitted by the parties have been given careful consideration and to the extent not adopted by this decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

References to the record are made in parenthesis using the following abbreviations:



*Initial Decision*

CX—Commission's Exhibit; RAPX—A&P's Exhibit;  
Ans.—Answer; Tr.—Transcript of the Testimony;  
DTR—Malone Deposition Transcript, CX 262; Comp.  
—Complaint; Adm.—Admission.

Having reviewed the record in this proceeding and having considered the demeanor of the witnesses as they testified, together with the proposed findings, conclusions and briefs submitted by the parties, I make the following:

## FINDINGS OF FACT

*A. A&P's Identity and Business Nature*

1. Respondent A&P is a corporation organized, existing and doing business under and by virtue of the laws of the [4] State of Maryland, with its principal office and place of business located at 420 Lexington Avenue, New York, New York (Comp. Par. 1; Ans. Par. 1).

2. Respondent A&P is now and for many years has been engaged in the operation of a large chain of grocery stores. During the middle 1960's A&P ranked first nationally in terms of sales among retail grocery chains (CX 218G; Smith, Tr. 1340). It operates approximately 4,329 stores in 36 states of the United States, the District of Columbia and Canada. It also operates a number of plants for the manufacture and processing of food and other products handled in its stores including plants which process and manufacture milk and other dairy products. Its annual sales for the fiscal year ending February 22, 1969 totaled over 5.4 billion dollars and, for the fiscal year ending February 1970, totaled over 5.7 billion dollars (Comp. Par. 2; Ans. Par. 1). A&P stores carry a full range of grocery and related products, many of which are purchased by A&P from other national sellers of goods and are shipped to A&P across state boundaries (CX 218E, F;

*Initial Decision*

Smith, Tr. 1387-1388; Schmidt, Tr. 1677-1678). A&P also manufactures and sells many private label products in its stores and did so even before 1965 (Smith, Tr. 1380-1381). It was A&P policy to promote private label products where feasible because their sale usually resulted in larger gross profit, greater attraction of the public to A&P stores and more flexibility for A&P in its dealing with suppliers (Corbus, Tr. 7325).

3. At the time of the private label agreement which is involved in this case, A&P's Chicago Unit encompassed the States of Iowa, Indiana and Illinois (including the Chicago metropolitan area). It operated approximately 260 stores. In 1969, the Unit became a Division which was comprised of 236 stores (Comp. Par. 2; Ans. Par. 1; Schmidt, Tr. 1675; Bartels, Tr. 1853-1854).

4. Products sold through A&P's Chicago Unit stores were procured under the supervision and control of the Head Buyer located in Chicago who, for most of the 1964-1969 period, was Mr. Elmer Schmidt (Schmidt). He was also personally responsible for the Unit's purchases of dairy products [5] except for cheese (Schmidt, Tr. 1667-1669). During the middle 1960's Borden was the principal supplier of dairy products to A&P's Chicago Unit and supplied about 95 percent of that Unit's requirements (Schmidt, Tr. 1678). Sales of dairy products by Borden to A&P's Chicago Unit amounted to millions of dollars annually with purchases of eleven of the most important items amounting yearly to somewhere between 5 and 6 million dollars (CX 263B; Schmidt, Tr. 1679).

5. It was A&P's Chicago Unit which was involved in the private label agreement with Borden here at issue. And although A&P Headquarters in New York gave final ap-

*Initial Decision*

proval to that private label agreement, and reviewed the reliability of the supplier chosen (Smith, Tr. 1347), the private label negotiations themselves were handled primarily at the Unit level (Smith, Tr. 1355-1356; Archer, Tr. 1232-1233). Indeed, it was A&P's Unit Buyer, Schmidt, who was the principal company official involved for A&P in the Chicago private label negotiations (Bartels, Tr. 1865). Schmidt undertook these negotiations as part of a planned move toward private label originating at A&P's New York Headquarters (Bartels, Tr. 1862-1863; Smith, Tr. 1351-1352).

6. The A&P Chicago Unit was one of four Units comprising the A&P Middle Western Division which included among other areas Milwaukee, Wisconsin (Smith, Tr. 1344; Bartels, Tr. 1857). Mr. Ira Bartels (Bartels) was A&P's Director of Purchases for the Middle Western Division from 1964 until 1969 and supervised the activities of Schmidt (Bartels, Tr. 1853-1854, 1858; Schmidt, Tr. 1673-1674).

7. During the middle 1960's A&P was composed of between five and seven divisions consisting in all of 32 Units. In charge of purchases of each Unit was the Unit Buyer such as Schmidt of the Chicago Unit. The Unit Buyer reported directly to the Divisional Purchasing Director, such as Bartels of the Middle Western Division, who in turn reported to the Division President and to the National Purchasing Director located in New York City Headquarters. Similarly, the Unit Sales Manager reported directly to the Divisional Sales Director who in turn reported to the Division President and to the National Director of Sales located in the New York City Headquarters (Smith, Tr. 1336-1337; CX 258). In 1969 the Unit-Division setup was abolished and A&P created 32 Operating Divisions so that the Chicago Unit became

*Initial Decision*

a Division. Bartels was designated Purchasing Manager when the Chicago Unit became a Chicago Division and Schmidt was designated as Buyer and [6] later as Administrative Assistant (Bartels, Tr. 1853-1854; Schmidt, Tr. 1663-1664). When Bartels left the employment of A&P in 1970, Mr. Edmund Bayma (Bayma) became Purchasing Director of the Chicago Division (Bayma, Tr. 5918).

*B. Borden's Identity and Business Nature*

8. Respondent Borden (formerly The Borden Co.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 277 Park Avenue, New York, New York (Comp. Par. 4; Ans. Par. 15-4).

9. Respondent Borden does business throughout the United States and in Canada (Minkler, Tr. 88; Archer, Tr. 1203). As of December 31, 1969 Borden held a 100 percent voting power in about 22 subsidiary corporations and possessed about 200 plants that were managed by four Operating Divisions (Comp. Par. 5; Ans. Par. 15-5). Its Dairy and Services Division conducts a dairy business in which the chief trade name is Borden. Borden's net sales in 1969 as well as in 1970 amounted to over 1.8 billion dollars (Comp. Par. 5; Ans. Par. 15-5).

10. In the course of its business Borden owns, maintains and operates receiving stations, processing and manufacturing plants and distribution depots located in various states from which it sells and distributes its products. Borden sells its milk and other dairy products to various purchasers including retailers. Most of its retailer-customers resell to consumers and certain of its retailer-customers are in competition with other of its retailer-customers (Comp. Par. 8; Ans. Par. 15-8). A&P, whom

*Initial Decision*

Borden served in the Chicago and Northwest Indiana area during all of the time involved in this case, is now and has been in active competition with certain other corporations, partnerships, firms and individuals also engaged in the purchase for resale and resale of grocery and household products including milk and certain other dairy products (Comp. Par. 3; Ans. Par. 15-3; A&P's Adm. dated March 12, 1973, p. 4, 5; Gintert, Tr. 2442; Barney, Tr. 3688).

11. From the early 1960's through the end of 1966 Borden managed certain of its dairy operations through its Chicago Central District or Division which included Chicago, Illinois, the northern part of Illinois, part of Iowa, part of Minnesota, most of Wisconsin, part of Michigan and the [7] northwestern corner of Indiana (Minkler, Tr. 88). The Chicago Central District Management Group consisted in part of Mr. Ralph Minkler, President (Minkler); Mr. Joseph Malone (Malone), Vice President, Regulatory Controls (and formerly Comptroller); Mr. Gordon Tarr (Tarr), Sales Manager for Chain Stores; and Mr. Orville Gose (Gose), Regional General Manager (Minkler, Tr. 88, 111-113; Tarr, Tr. 843; Gose, Tr. 1037). After 1966, Borden's Chicago Central District was merged into its Midwest District in Columbus, Ohio. Minkler retired in December 1966 but Malone, Tarr and Gose remained (Minkler, Tr. 87, 279, 331; CX 262 Malone, DTR. 6, 7; Tarr, Tr. 842; Gose, Tr. 1067).

12. Minkler reported to the President of Borden's Milk and Ice Cream Division in Borden's New York Headquarters. That post was first filled by Mr. Harry Archer (Archer) who was succeeded in the middle 1960's by Mr. Pentz (Minkler, Tr. 98, 126; Archer, Tr. 1203-1205, 1207-1208; CX 292 p. 2). After Chicago Central District's merger into the Midwest Division, Borden's Chicago personnel



*Initial Decision*

reported to Mr. Patterson, President of Borden's Midwest District in Columbus, Ohio, who in turn reported to Borden's New York City Headquarters (Gose, Tr. 1059).

*C. Commerce*

13. A&P admits that it has been and is now engaged in "commerce" as that term is defined in the Federal Trade Commission Act and amended Clayton Act (Ans. Par. 2; Adm. dated September 27, 1972, p. 7, Sec. III, 1-2). A&P also admits transporting across state lines goods which it had produced or processed in one state for sale through its stores in other states. Its Chicago Unit included stores in the states of Illinois, Indiana and Iowa (Schmidt, Tr. 1665, 1674) and advertised in newspapers distributed in both Illinois and Indiana.

14. Borden also admits that it has been and is now engaged in "commerce" as that term is defined in the Federal Trade Commission Act (Adm. filed March 19, 1973, p. 11, Sec. III-3). It also admits that it regularly transported raw milk from one state to another and that its plants received in excess of 10 percent of their raw milk supply from dairy farms in states other than those in which the plants are located (Adm. filed May 5, 1972, pp. 4, 5). Borden advertises nationally (CX 212M; CX 214E). Its Woodstock, Illinois, plant obtains much of its raw milk from Wisconsin (Minkler, Tr. 104). After processing, the milk [8] and dairy products are shipped outside the state and outside the Federal Milk Marketing Order areas. The same Woodstock, Illinois, plant produced substantially all of the private label products sold to A&P under the private label agreement involved here, a great many of which products were then distributed to A&P stores in Indiana (CX 62; CX 263; Adm. filed May 5, 1972, p. 5). In addition to the Woodstock, Illinois, plant, Borden's Chicago

*Initial Decision*

Central District operated milk plants in Indiana, Iowa and Wisconsin (Minkler, Tr. 88).

15. A&P, pursuant to the private label agreement, purchased milk and dairy products from Borden for its grocery stores both within and without the state of Illinois (CX 62; CX 182; CX 187; CX 263). Borden, to fulfill the private label agreement, obtained part of its milk from out-of-state and processed certain milk and dairy products in its plant at Woodstock, Illinois (Adm. filed May 5, 1972, pp. 4-5). Borden then shipped said products across state lines to be delivered to A&P's out-of-state stores.

16. Woodstock, which opened in 1964 and was in full production by 1965 or early 1966, received its raw milk from the Chicago Milk Shed which extends through Wisconsin, Illinois and Indiana (Minkler, Tr. 104-105, 110; Adm. filed September 29, 1972, p. 8, Par. III-5; CX 211B, D, G; Minkler, Tr. 99-100).

17. Borden's practice in connection with its Woodstock operations was to purchase raw milk as needed for the expected demands of its customers, process it and deliver it to its customers as quickly as possible. Milk was not stored at Borden's Woodstock plant more than approximately 24 hours during this process (Borden Adm. dated March 15, 1973, III-28; Minkler, Tr. 108-109). At the processing plant milk was inspected, cooled, standardized and in some cases fortified, pasteurized and homogenized (Minkler, Tr. 107-109; Tise, Tr. 5834-5837). Processing of the major fluid milk items—milks and creams which accounted for over 70 percent of Borden's sales (RAPX 75)—is a nearly instantaneous mechanical procedure which does not alter the product's chemical composition (Tise, Tr. 5834-5837; Graham, Tr. 7078-7079; Minkler, Tr. 107-108). Pasteurization is required before milk can be shipped

*Initial Decision*

in interstate commerce (Tise, Tr. 5829-5830; Graham, Tr. 7072). Borden sells milk to a wide range of customers including retail stores. Such customers are also [9] located in states other than the state of Illinois in which Woodstock is located (Minkler, Tr. 114; Malone DTR. 23-24). A substantial amount of the milk and dairy products processed at Woodstock was distributed through the Hammond, Indiana, Distribution Depot (Minkler, Tr. 102-103; Malone DTR. 26-28). The Hammond Depot primarily served customers in the state of Indiana (Minkler, Tr. 103). Among Borden's customers in this area were a number of A&P stores.

18. All of the acts and practices described above are and were performed in a constant current of commerce with raw milk flowing across state lines into Woodstock and processed milk and dairy products flowing across state lines to Borden's various customers including its largest chain store customer in the area, the retailer A&P.

*D. The Negotiations*

19. In late 1964 A&P decided to explore the possibility of selling private label milk and dairy products in the stores of its various divisions. Mr. Herschel Smith (Smith), A&P's Headquarters Dairy Buyer, held a meeting in New York City at which he explained A&P's new New York private label milk program and instructed the company's divisional purchasing managers to discuss with Unit Buyers the possibility of instituting similar private label programs in their various areas (Smith, Tr. 1350-1352; Bartels, Tr. 1862-1864). A&P's Middle Western Division Purchasing Director, Bartels, attended this meeting. Shortly thereafter and pursuant to these instructions he instructed A&P's Chicago Head Buyer, Schmidt, to initiate negotiations with Borden for private label milk (Bartels, Tr. 1862-1865).

*Initial Decision*

20. Schmidt, A&P's Head Buyer for its Chicago Unit, was in charge and conducted the ensuing negotiations. Bartels, A&P's Middle Western Division Purchasing Director, supervised and was kept informed of Schmidt's over-all activities (Schmidt, Tr. 1668-1669, 1683; Bartels, Tr. 1865-1866; CX 12A).

21. Minkler, the President of Borden's Central District, was in charge of the ensuing negotiations for Borden. Minkler made all the decisions as to what to offer A&P and how to proceed. He communicated with Schmidt or Bartels on important occasions (Minkler, Tr. 123-125, 201-203, 225-228, 247-248; CX 7; Tarr, Tr. 885-887).

**[10]** 22. Minkler was assisted during the negotiations by Malone, Borden's Central District Vice President for Government Controls and Borden's expert cost accountant. Malone was very knowledgeable concerning all aspects of Borden's production and distribution expenses in the Chicago area and counseled Minkler concerning Borden's costs of serving A&P during the entire course of the negotiations (CX 262, Malone DTR. 6-8, 10-15, 29-32, 39; Minkler, Tr. 111-113, 309-310; CX 42, 54). Malone prepared all of Borden's costs analyses and most of Borden's private label proposals to A&P (CX 14, 18, 21, 23-28, 36, 42, 54, 62, 87). He was extremely well respected and was relied upon by both Borden and A&P officials (Minkler, Tr. 309-310). A&P's Bartels testified: "The Borden Company . . . had . . . very sophisticated cost accounting and legal departments" (Bartels, Tr. 1894A).

23. Tarr was Borden's Central District Chain Store Sales Manager and handled most of the line contact with A&P during the negotiations. Tarr spent about 80 percent of his time servicing the A&P account (Tarr, Tr. 845-846, 848-850, 876-878).

*Initial Decision*

24. Around November 1964, A&P asked Borden to submit a private label offer for Chicago. Minkler and Malone immediately prepared a Borden proposal which granted A&P a 1 cent discount per half gallon of private label milk provided A&P would accept drop delivery and limited service, that is, store door delivery with no in-store service, no special deliveries, and no returns except for inferior or defective products (CX 5, 6; Minkler, Tr. 133-134; CX 262; Malone, Tr. 32-33). The offer was transmitted to Borden's New York office in late November 1964 and turned over to A&P in New York on December 2, 1964. A&P refused this offer (CX 5, 6, 7F, 12; Minkler, Tr. 133-137, 140-142; Archer, Tr. 1209-1212).

25. Although Borden's profit margin in the Chicago area might be cut by a reduction in its price on private label products it could not refuse to make such a reduction because it was dependent on continuing to serve A&P (CX 7D-F).

26. Borden was also concerned with A&P's possible retailing plans for private label milk. A&P was in the [11] initial stages of implementing a nation-wide plan to install private label milk in its stores (Smith, Tr. 1350-1353). In some areas, including Columbus, Ohio, Dayton, Ohio, and Dallas, Texas, A&P had introduced private label milk at a lower out-of-store price than advertised label milk (CX 8G-I; Miller, Tr. 5975-5976, 5978). Smith of A&P had discussed at least some of the cities with Archer in connection with A&P's private label plans for Chicago (CX 7F). Borden felt that if A&P followed this policy and introduced private label milk at such a differential in Chicago a price war would follow and its profits would be destroyed (CX 7D-F; Minkler, Tr. 154-157).

27. Minkler prepared a new private label offer to A&P which granted a 2-cent per-one-gallon price reduction which



*Initial Decision*

Borden tendered to A&P in late January but which was also refused (CX 7G-I, 9, 11, 12).

28. On February 5, 1965, Smith of A&P requested A&P's Chicago Office to take over the negotiations. Bartels turned the matter over to Schmidt and he in turn called Tarr of Borden to request an offer (CX 11; Schmidt, Tr. 1688; Tarr, Tr. 849-851).

29. Schmidt told Borden that "he very much appreciated the sensitiveness of this market". He added that Borden "had to be right" if A&P was not to put its private label business out for bids (CX 12).

30. Borden thereupon prepared a full and complete offer to sell private label milk and dairy products in the Chicago-Calumet area of Illinois and Indiana (CX 14). The Chicago-Calumet area encompassed the A&P stores in the Chicago area, its immediate Illinois suburbs and the Calumet area of Indiana, including Gary and Hammond, Indiana. This area was served by a number of Borden distribution branches including Borden's O'Hare Branch at Irving Park, Illinois, and Borden's Hammond Branch at Hammond, Indiana (CX 262, Malone DTR. 72; Gose, Tr. 1072-1073; RAPX 68). Tarr delivered the offer to Schmidt on February 9, 1965 and discussed it with him (Tr. 850-852). Borden's new offer granted A&P a discount of 2.55 cents per-half-gallon off its then current price and commensurate reductions of the other 5 main items taken by A&P which products accounted for 70 percent of A&P's total sales of milk in the Chicago-Calumet area. Borden also quoted a private label price on 5 by-products. This offer indicated that Borden would realize only .45 cents per-quart gross profit on sales of the main homogenized Vitamin D milk products (CX 14D).

*Initial Decision*

**[12]** 31. In May, Schmidt asked that Borden come up with a private label program for areas outside of A&P's Chicago-Calumet area. Such outside areas extended north to the Wisconsin state line, west into Iowa, south almost as far as Peoria, Illinois and east beyond South Bend, Indiana to Goshen, Indiana (Tarr, Tr. 856-857; CX 18C, E, G, L). Borden prepared such an offer setting different prices for each zone of A&P's outside areas for each product offered under private label for Chicago (CX 18, 17B, C).

32. A&P was not interested in having only some of its stores in Illinois or Indiana supplied with private label milk. Later, when Bowman was invited to bid, a list of all the A&P stores in Indiana, Iowa and Illinois was given it (Cannon, Tr. 6126-6127). The Dean Dairy was rejected when it bid only on Indiana stores (Schmidt, Tr. 1711). It is thus clear that the private label arrangement of A&P with its supplier was unavoidably interstate in character and that sales of milk to A&P stores in Illinois would be made only if A&P stores in Indiana were also served by the supplier.

33. Borden's May offer (CX 18-0) shows that the dairy expected to lose money on its sales of gallon containers of milk and that its gross profit on half gallons to be only .11 cents. Its total gross profit from sales of the higher volume containers (gallons, half-gallons and quarts) would be only \$76.89 per week. The gross profit referred to takes into account only the cost of raw milk, containers, production, route delivery expense and other distribution expense.

34. A&P's business represented more than 55 percent of Borden's wholesale route business in the Chicago area and

*Initial Decision*

25 percent of its Woodstock plant production. Borden could not, therefore, afford to lose the A&P business by refusing to lower its prices to A&P (CX 7F, 42 A-D). At the same time Borden feared that A&P might cut its out-of-store price for private label milk below the market price for advertised label milk (CX 7-D, E; Minkler, Tr. 155-157). Actually, A&P was selling private label milk at a reduced out-of-store price in two out of the three areas studied (CX 8 G-J) and had introduced private label milk at a reduced price in Dayton, Ohio in February 1965 (Miller, Tr. 5975-5976). Consequently, Borden believed that if A&P created such a differential the market price for advertised label milk would break and a price war would result (CX 7E). Such a price war had been experienced by Minkler and Malone in Wisconsin a year earlier and in [13] Chicago during the 1950's (Minkler, Tr. 155-156; Malone DTR 97-99; Soberg, Tr. 2753, 2754-2764). Such a price war would not only reduce profits of all dairies in the area but Borden particularly, because of its investment in the new Woodstock plant which cost over five million dollars (CX 13J). Many of the other dairies in this area were older and fully depreciated and thus had substantially lower fixed costs (Schaub, Tr. 3110-3111). Thus, if Borden reduced its price and A&P followed suit at retail level for private label milk, a price war might ensue and reduce Borden's profit. If Borden refused A&P's request for lower prices Borden would lose A&P's business and the volume necessary to operate Woodstock efficiently. Neither position was desired.

35. On May 25, 1965, Tarr and Malone delivered Borden's offer for the outside areas to A&P and discussed Borden's position with Schmidt (CX 19A). Borden pointed out that it expected almost no profit from the A&P contract but that it was presenting such a bid because A&P's

*Initial Decision*

business was vital to Borden's efficient use of its Woodstock plant. Schmidt pointed out that A&P's goal in its private label program was to increase its gross margin on milk. The Borden representatives, however, warned that this could not be accomplished if A&P reduced the price on private label milk, citing a price war that had occurred in Wisconsin as the result of private label pricing (CX 19E, F; CX 262; Malone DTR 97-98).

36. In July 1965 A&P asked Borden to revise its May quotations for the outside areas to take account of possible savings in delivery costs. On July 26, Tarr delivered the revised quotation to Schmidt (Tarr, Tr. 863-865; CX 21).

37. On July 26, 1965, Bartels of A&P met with Minkler to discuss Borden's costs and to push for lower prices. Bartels wanted to know why Borden's Chicago costs were higher than its New York costs and Minkler agreed to review the matter (Tarr, Tr. 863-869; CX 21, CX 22A-D, CX 25B).

38. Malone prepared a written response to Bartels' questions (CX 23-25A). This response indicated that the primary reason for Borden's higher costs in Chicago was that Borden's Chicago delivery costs were higher in that the Chicago dairy drivers were paid substantially more than their New York counterparts; that union limitations on types of delivery and stricter health regulations limited efficiencies in delivery in Chicago; that A&P stores in New York made larger average purchases; and that there was a greater density [14] of A&P stores in New York. Malone concluded that Borden's gross margin per quart would be .36 cents not .45 cents as previously calculated and pointed out that this margin figure did not include anything for either overhead or burden (CX 23C-G, 24D). This cost study was submitted by Minkler and Malone to

*Initial Decision*

Bartels on August 6, 1965, and discussed with him (Minkler, Tr. 202-203; CX 262, Malone DTR 114).

39. Again, in August, A&P requested Borden to lower its offering price on some of the by-products. On August 13, Tarr presented Schmidt with a new revised bid for both the Chicago-Calumet area and A&P's outside areas (CX 31, 36, 37). The new bid focused on A&P's profit as a result of the private label contract indicating that A&P's costs would be reduced some \$410,000 (CX 37 A-F, CX 36; Tarr, Tr. 869-871).

40. Nevertheless, Schmidt told Tarr that A&P was not satisfied and had decided to put the matter out for bids (Tarr, Tr. 871-873). Tarr had told Schmidt at various times that some dairies in the area might bid under their cost to get A&P's business (Tarr, Tr. 872). On August 18, 1965, Minkler told Bartels that other dairies might submit bids which included only out of pocket or direct costs leaving out all fixed charges, on the theory that these costs were already covered by their present business (Minkler, Tr. 213-214). Nevertheless, Bartels indicated that he was proceeding to get other bids.

41. Malone calculated that if Borden lost A&P business Borden's gross profit would be reduced more than 1.6 million dollars per year compared to the private label price reduction of some 400 thousand dollars (CX 42A-D, CX 262, Malone DTR 122-123).

42. During the latter half of August A&P asked Bowman Dairy, Dean Milk Co. and Sidney Wanzer & Sons to submit bids for A&P's business. Wanzer was not interested and the Dean Milk Co. submitted a bid for a part of Northern Indiana only, an area which A&P did not want



*Initial Decision*

served separately from Chicago (CX 45, 51A-C; Schmidt, Tr. 1711).

43. Bowman Dairy submitted an offer to A&P (CX 50). Schmidt immediately telephoned Tarr and told him that Borden's bid was "so far out of line that it is not even funny. You are not even in the ball park . . . this bid is so far different from yours that there isn't any comparison" (Tarr, Tr. 873-874). Schmidt added that even if Borden's promotions and other assistance were valued at \$50,000 per year "this would not be a drop in the bucket" (Tarr, Tr. 874).

[15] 44. The next day, September 1, 1965, Schmidt met with Tarr and told him that the new development was "terrible" and that Borden's bid was "nowhere near", to which Tarr replied that some bids might "be screwy" and that he didn't see how anyone can sell any cheaper than Borden (Tarr, Tr. 873-874).

45. Malone had computed what a bid based upon direct costs only would be. Borden also knew that losing the A&P account would cost it about 1.6 million dollars per year. As Minkler explained (at Tr. 225-226):

This became not a matter of logic in many respects. It was a matter of struggling to try to guess again what might have been put in there by a competitor. I must tell you that it was just largely [pure] guess. We had the \$410,000 [bid] in, we were clearly told that an additional \$50,000 wouldn't begin to cover the difference, there are [the] facts that we had to consider.

In addition to that, we had this figure of one million six hundred some thousand dollars that it would cost us if we lost the business. We had to weigh that, and

*Initial Decision*

at some point, I said that it seemed to me that we had to consider doubling this \$410,000 figure, and you could ask me all night how I arrived at that, and I wouldn't be able to tell you except that we were just determined that we had to save this volume for this brand-new plant that we were just bringing on stream.

We were really desperate and by that time, we were pretty well convinced that the approach by the competitor had been on an anyhow accounting basis, they were going to get it and correct their problem later on, we rationalized, so I again got New York on the phone and got their clearance if I thought this was all that could be done to go ahead.

I was told, save the business. . . .

46. On September 8, 1965, Minkler and Tarr met with Schmidt to discuss a further Borden bid (CX 55E). Schmidt [16] "reiterated the conversations almost verbatim that he had with [Tarr], that [Borden's offer] wasn't even in the ball park, and how shocked and surprised he was at our company trying to go along with such a low bid when someone else was bidding and . . . the whole thing" (Tarr, Tr. 876-887; Minkler, Tr. 226). Minkler offered to submit a new quotation which would yield A&P a saving of \$820,000 per year, double the saving of Borden's then current bid. Minkler stated that this offer was made "on the basis of meeting competition" (Minkler, Tr. 227-228). Minkler also stated his belief that the bid submitted by Borden's competitors probably took only direct costs into account and were based upon "anyhow accounting" but that Borden could not lose A&P's business (Minkler, Tr. 227-228, 237-238, 376-377). Schmidt said "now you are in the ball park" and asked Minkler and Tarr to go back, spread the new savings figures to Borden's product line and write up a form of service (Minkler, Tr. 243-244; Tarr, Tr. 878-879).

*Initial Decision*

47. During the following week Borden worked up a formal quotation including the 11 items previously offered under private label as well as glass gallons of homogenized Vitamin D milk and 2 percent milk. Tarr told Schmidt of this change in the offer and Schmidt said such change would be fine (Tarr, Tr. 880-882; Minkler, Tr. 244-245). The new bid was submitted to Schmidt's assistant by Minkler and Tarr on September 17, 1965 (CX 56, 57, 58; Tarr, Tr. 883; Minkler, Tr. 245).

48. Shortly thereafter, Schmidt called Tarr to reject the offer telling Tarr that Borden's bid was not fair to the other bidders who "did not bid on glass gallons" (Tarr, Tr. 883-884; Minkler, Tr. 245). However, the Bowman Dairy offer *had* specified glass gallons of milk (CX 50). Actually, A&P did not want to sell private label milk in glass containers (Schmidt, Tr. 1777-1780). Schmidt also told Tarr that Borden should "sharpen your pencil a little bit because you are not quite there" as a result of which Borden reduced its price somewhat (Tarr, Tr. 884-885, 963-965).

49. The Bowman bid was apparently based upon volume and A&P did not ascertain how a different volume would affect that Bowman bid except to determine that if Bowman sold less volume to fewer stores its prices would go up (Schmidt, Tr. 1760-1761). The Bowman bid also assumed certain possible days of delivery in the Gary-Hammond area. A&P did not ascertain how a change in such assumption would affect this offer.

**[17]** 50. Borden prepared a corrected bid spreading the 820 thousand dollars to the original 11 item private label product line (CX 62). Using the raw milk prices as of the first half of 1965, the savings to A&P would have been over

*Initial Decision*

880 thousand dollars but since the raw milk prices had risen in the meantime the actual savings would be about 820 thousand dollars (CX 66B). The new bid reduced Borden's price for a half gallon of milk by 5.75 cents below its then current advertised label price to A&P and by about 3.2 cents below Borden's July 26 prices, the last price Borden had made any effort to cost justify (CX 62, CX 21).

51. Minkler and Tarr presented Borden's final bid on September 21, 1965. Minkler told Schmidt:

. . . I said, "Elmer, there is certainly something here that I want you to very definitely understand." I said, "This price is given to you by us on the feeling and belief that *we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis.* You must make that clear to your superiors and to your legal people. I don't know what may come of this in the future, but I want you to understand this [:] we are going to say always that we felt we were meeting a competitive offer that you had received from someone else." And he said to me, words to the effect, "Ralph, you don't need to worry. I read you loud and clear. I understand what you are saying. My superiors and our legal department will understand it." And he says, "Just don't worry about it." (Minkler, Tr. 247-248; emphasis supplied).

52. Mr. Tarr, a witness to the meeting, testified to the same effect:

At the last of it, Mr. Minkler said, and I can't give you his exact words, but in effect he said, "Now, Elmer, look, we have met a competitive situation here on this bid, on this quote. You know that. This is right, isn't it", and Elmer said "Yes." (Tarr, Tr. 886; also see Tr. 1020).

*Initial Decision*

**[18]** 53. Minkler also told Schmidt that the new bid was based upon "anyhow accounting" (CX 63A-D). Schmidt admitted that Borden told him on this occasion and in many other conversations that the final bid was based upon "meeting competition" (Schmidt, Tr. 1782-1801).

54. Schmidt requested a letter from Borden stating that its prices were proportionately available to others (CX 66). Instead, Borden supplied a letter which stated only that Borden felt its prices were legal and that it was prepared to defend them (RAPX 2). This letter was not in Borden's usual form relating to offers which were available to others (Archer, Tr. 1254-1255, 1258). Herschel Smith, A&P's Headquarters Dairy Buyer, understood that Borden's letter did *not* say its prices were available to others (Smith, Tr. 1427-1429, 1438-1440).

55. Schmidt submitted Borden's new bid and Bowman's bid to Bartels noting that Borden's bid offered a savings of 820 thousand dollars while Bowman's savings amounted to some 737 thousand dollars. Schmidt recommended retention of Borden as did Bartels who forwarded it to Smith in New York (CX 66A-B, CX 65A-C; Schmidt, Tr. 1713-1716; CX 263). Smith noted that Borden's offer was "substantially better" than the one from Bowman and approved Borden on October 14, 1965 (Smith, Tr. 1369, 1413-1414; CX 263, 70). Borden commenced serving A&P in its Chicago area in November 1965 (CX 75A-J, 255B).

56. During mid-November 1965 Borden brought its service and delivery terms to A&P on Borden label products in line with those granted on A&P label products but at a substantially lower discount (RAPX 66). Thus, during 1966 and thereafter Borden's maximum discount to A&P taking the same service on Borden label products was 30 percent while A&P's private label discount was 35 to 38 percent.



*Initial Decision*

57. On May 24, 1966, Borden increased its Borden label list price by .5 cents per point<sup>2</sup> to reflect its increased container, labor and social security costs. At Borden's maximum discount of 30 percent this increase raised Borden's prices by .35 cents per point (CX 124, 125, 139, 140, 123, 138; Gose, Tr. 1110). Borden informed A&P of the price increase [19] and asked that A&P accept a commensurate increase on A&P label products (CX 79; Gose, Tr. 1050-1054; CX 262, Malone DTR 178-180). A&P accepted the increase on Borden label products but refused to accept it on private label products (CX 81; Gose, Tr. 1053-1054; CX 255B). The contract on private label provided that prices were to be subject to change to reflect increased container and labor costs (CX 62H-J, M).

58. Again, in March 1967, Borden asked A&P to accept the price increase to reflect cost passed on to Borden's other customers in 1966 pointing out that all of its other customers had accepted the price increase (Gose, Tr. 1056-1062; CX 102-103, 105, 106). A&P refused to accept more than a .2-cent per-point price increase on private label products (CX 102B, 106C, 110, 225B; Gose, Tr. 1058).

59. After the institution of the private label agreement with A&P, Borden reorganized its Chicago Central District merging it with another district. Minkler explained that this was necessary because of the reduction in income occasioned by the lowering of its price to A&P on private label products by some 800 thousand dollars (Minkler, Tr. 276-280). Job positions involving almost all facets of the Borden operation were eliminated within the Chicago region following the beginning of the Borden-A&P private

---

<sup>2</sup> A point is equivalent to a quart of whole milk. Thus a gallon is measured as four points and a half gallon as two points. Some other dairy products have different point values.

*Initial Decision*

label arrangement due, at least in part, to that new arrangement (Gose, Tr. 1069-1070).

*E. Grade and Quality*

60. Respondent A&P admits:

[S]ubstantially all of the fluid milk products Borden supplied under A&P's private label to A&P stores [in the area of complaint counsel's proof] during the period November 1965-1970 were physically and chemically identical to the equivalent products contemporaneously sold under the Borden label to these A&P stores and to other stores in the "Chicago and suburbs", Gary, Hammond and Valparaiso areas (A&P's Adm. Filed March 12, 1973, Par. III-6).

Borden admits substantially the same thing (Borden Adm. filed September 29, 1972, Par. III-10; Minkler, Tr. 250; Schmidt, Tr. 1727-1729).

*F. Contemporaneous Sale*

61. Respondent A&P admits that the fluid milk and dairy products sold by Borden under private label to A&P stores [20] in the area in question and contemporaneously under Borden label to competing retailer-purchasers, were commodities sold for use, consumption or resale within the United States (Comp. and Ans. Pars. 8, 9; A&P Adm. Par. III-6).

*G. The Discrimination**I. The Gary-Hammond and Valparaiso Areas of Indiana*

62. Burger's Super Markets, Inc., operated a supermarket in Hammond, Indiana, which competed with the A&P stores in Hammond, Indiana (A&P's Adm. Par. III-9

*Initial Decision*

(a)-(e); White, Tr. 2064-2065; Kristoff, Tr. 2285-2286). Burger's store purchased about two to five times as much milk from Borden as its A&P store competitors (CX 182; RAPX 234 p. 19) and was substantially larger than its A&P store competitors in Hammond (Kristoff, Tr. 2270-2271, 2381, 2385).

63. Model Food Center, Inc., operated a super market in Hammond, Indiana, also. A&P admits that the Model Food Center in Hammond, Indiana, competed with its A&P store #306 in the Hammond suburb of Munster, Indiana (A&P Adm. Par. III-9(a)-(e)). Model Food Center purchases of fluid milk products from Borden were commensurate with the A&P stores in the Gary-Hammond area with which it competed (CX 182; Barney, Tr. 3682-3688).

64. Wallies Market in Hammond, Indiana, purchased fluid milk and dairy products from Borden from 1966 until December 1, 1969. A&P admits that Wallies Super Market competed with one of its stores (A&P's Adm. Par. III-9(a)-(e)). Wallies bought approximately the same amount of milk from Borden as its A&P competitors during the period 1966-1969 (CX 182).

65. Wilco Food Center is a supermarket in Gary, Indiana. A&P admits that during the period 1964-1970 Wilco Food Center competed with one of its stores in Gary (A&P's Adm. Par. III-9(a)-(e)). Wilco bought substantially more than twice as much milk from Borden as the average A&P store in the Gary-Hammond, Indiana area (CX 182).

66. Joseph Tittle & Sons, Inc. (Tittle) operates and has operated a chain of supermarkets in Northwestern Indiana for many years. Between October 1966 and March 1967 Tittle owned and operated five supermarkets in this area,

*Initial Decision*

two in Gary, Indiana (Lake Street and Village Court), one in Hammond (Hohman), one in a suburb of Hammond (Highland), and one in Valparaiso, Indiana. Between 1967 and 1969 [21] Tittle sold its Hohman store and moved its Village Court store to another location. Consequently, between 1969 and 1970 Tittle had two stores in Gary, one in Highland and one in Valparaiso. A&P admits that the Tittle stores competed with its A&P stores in such areas (A&P Adm. Par. III-9(a)-(e); Minard, Tr. 3136-3138, 3141-3148). The Tittle stores in Gary bought approximately the same volume of milk from Borden as the A&P stores in the area. In Hammond the volume of the Tittle stores was lower than the volume of some A&P stores but higher than others. In Valparaiso the Tittle Store's volume was at least three times more than that of the A&P store (CX 182).

67. Burger's Market bought slightly more than 28 thousand dollars worth of milk products from Borden between October 1966 and March 1967. Had it been charged A&P's prices under A&P's private label agreement with Borden, Burger's Market would have paid \$3,468.77 less. It, therefore, sustained a price discrimination of 14 percent. Between June 1969 and March 1970 it bought over 84 thousand dollars of milk products from Borden but would have paid \$11,506.15 less had it been charged A&P's prices under the private label agreement, sustaining a 15.7 percent price discrimination (CX 187, 188A).

68. During the same two periods Model Food Center was charged \$12,496 in the earlier period and \$29,519 in the later period. Had Model been charged A&P prices under its private label agreement with Borden, Model would have saved \$2,297 in the early period and \$4,138 in the later period, thus experiencing a price discrimination of 22.5

*Initial Decision*

percent in the early period and 16.3 percent in the later period (CX 191A, 187).

69. Wallies Market bought more than \$14,000 worth in the early period and a similar amount in the later period. Had it been charged A&P prices under the private label arrangement it would have saved \$2,193 in the earlier period and \$2,203 in the later period reflecting a price discrimination of 17.5 percent for the early period and 17.6 percent for the later period (CX 200A, 187).

70. The Wilco Food Center paid more than \$35,000 for milk products in the same earlier period and more than \$71,000 in the later period. Had it been charged the A&P prices under the private label agreement with Borden it would have [22] saved \$4,550 in the earlier period and \$4,433 in the later period. The price discrimination amounted to 14.5 percent in the earlier period and 6.6 percent in the later period (CX 202A, 187).

71. Tittle's Lake Street store paid more than \$13,000 for milk products in the earlier period and more than \$32,000 in the later period. Had it been charged the A&P prices under the private label agreement with Borden it would have saved \$1,571 in the earlier period and \$1,939 in the later period. The price discrimination was 12.9 percent for the early period and 6.4 percent for the later period (CX 196A, 187).

72. Tittle's Village Court store paid Borden more than \$12,000 for fluid milk products in the earlier period and more than \$38,000 during the later period. Had it been charged the A&P prices under the private label agreement with Borden, it would have saved more than \$1,400 in the earlier period and more than \$1,800 in the later period,



*Initial Decision*

sustaining a discrimination of 12.5 percent in the earlier period and 5 percent in the later period (CX 197A, 187).

73. Tittle's Supermarket on Hohman Avenue in Hammond, Indiana, paid more than \$15,000 to Borden for fluid milk products during October 1966-March 1967. Had it been charged A&P's private label prices from Borden, it would have paid more than \$1,800 less, reflecting a 13 percent discrimination during that period (CX 195A, 187).

74. Tittle's Supermarket in Highland paid more than \$12,000 for fluid milk products bought from Borden during the early period or almost \$1,400 more than it would have paid had it been charged A&P's private label prices from Borden. This amounted to a 12.4 percent discrimination. During the later period of proof this store paid more than \$23,000 for fluid milk products but would have paid \$1,335 less had it been charged A&P's private label prices from Borden, thus experiencing a 5.9 percent discrimination (CX 194A, 187).

75. Tittle's Supermarket in Valparaiso bought approximately three and one-half times as much milk from Borden as the competing A&P store (CX 182). Nevertheless, during the first period it paid more than \$51,000 for fluid milk products bought from Borden which was \$7,603 or 17.5 percent more [23] than it would have paid had it been charged A&P's private label prices from Borden. During the second period of proof, it paid more than \$111,000 for such products or \$6,984 or 6.7 percent more than it would have paid had Borden charged it A&P's private label prices (CX 198A, 187).

76. Combined, the Tittle stores paid \$13,804 during the earlier period in excess of what it would have paid had it been charged A&P's private label prices from Borden. This

*Initial Decision*

was an average of 15 percent more. During the later period the Tittle stores paid \$12,104 more or 6.3 percent more than it would have paid had it been charged A&P's private label prices (CX 187).

77. The unfavored competitors described above purchased from Borden at lower discounts and at higher prices than enjoyed by A&P as a result of Borden's formula for pricing A&P private label products. This situation commenced with the institution of the private label program in 1965 and continued until it ended in February 1972 (RAPX 66; CX 187, 120-136, 288, 289; Bayma, Tr. 5932-5933; Kristoff, Tr. 2279; Barnes, Tr. 3852, 3914; Minard, Tr. 3155-3156).

*II. The Chicago and Suburbs Area*

78. A&P sold fluid milk and dairy products in all of its stores of the Chicago area as did all of Borden's other store customers in that area (CX 256, 183). Two of such other Borden's store customers were Mayfair Foods and Jim's Groceries, who competed with A&P stores in that area during February and March 1966.

79. A&P admits that its store No. 137 located approximately two blocks from Mayfair Foods drew customers from the area served by this independent food store (A&P's Adm. filed March 12, 1973, Par. III-11). This was corroborated by the store manager (Lasorso, Tr. 2644, 2646, 2686) who testified that he regularly compared his prices with the prices charged by A&P, and adjusted his prices in response to those of A&P. Customers of Mayfair and A&P shopped both stores.

80. Jim's Groceries was a member of Central Grocers Cooperative and was also known as Centrella store. It was located in Oak Park, Illinois, where it competed with

*Initial Decision*

A&P for the sale of fluid milk and dairy products during 1965 [24] and 1966 (A&P Adm. Par. III-11). This is confirmed by the owner of Jim's Groceries (Cox, Tr. 3946-3948) who testified that he checked A&P's prices in setting his own prices and that A&P was a competitor.

81. Borden's price to A&P on A&P label products in the Chicago and suburbs area in February and March 1966 was equivalent to a discount from list price of about 36.6 percent (CX 183). In May 1966 Borden imposed a price increase on Borden label products but A&P refused to accept it on the private label products (Gose, Tr. 1052-1054) and thus A&P's effective discounts from Borden's list prices rose to 37.8 percent as of August 1966 (CX 180). This continued until April 1967 when A&P accepted a partial price increase.

82. Borden's discount schedule in January 1966 established a maximum discount on Borden label products of 30 percent off of list (CX 138) which discount was available only to customers taking 600 points or more per delivery and the same service as granted to A&P. Although CX 138 states Borden's maximum discount to be 28% for such customers, Borden also offered an additional 2 percent discount if the store was centrally billed (Gose, Tr. 1110).

83. During February 1966 Mayfair Foods purchased milk and dairy products from Borden in the amount of \$2,736 and received a rebate of \$818 or 29.9 percent of the list price. During March 1966 Mayfair Foods purchased \$3,056 of such products and received a rebate of \$915 or 30 percent of the list price. During the same two months the A&P store with which Mayfair competed paid a net price which reflected a discount of about 36.6 percent of its private label purchases or 6.6 percent additional dis-

*Initial Decision*

count above and beyond that granted to Mayfair Foods (CX 183).

84. Jim's Groceries' purchases of milk and dairy products in February and March 1966 totaled \$2,269 and \$2,661, respectively. Borden's rebates totaled \$522 and \$607 or 23 percent and 22.8 percent respectively for those months (CX 183), which was in accordance with Borden's published discount schedule since Jim's Groceries took only about 400 points per delivery and did not take limited service or central billing (RAPX 173, pp. 82, 84). The A&P stores in Oak Park paid a net price which reflected an effective [25] discount of about 36.6 percent during this period. These A&P stores were about the same size or smaller than Jim's Groceries, taking about 251 points and 419 points for each of the two stores (RAPX 173, pp. 109, 116, 118). Even if the A&P stores qualified for an extra 2 percent discount for limited service and another 2 percent for central billing, these stores should have been receiving discounts of only 23 and 28 percent, respectively, not the maximum 30 percent discounts set out on Borden's discount schedule or 36.6 percent they actually received. The discrimination thus experienced by Jim's Groceries exceeded 10.4 percent.

85. The five highest volume items under the private label contract were homogenized milk quarts, homogenized milk half gallons, homogenized milk gallons, 2 percent milk half gallons and skim milk half gallons. These items accounted for 80 percent of Borden's expected sales to A&P pursuant to the private label contract (CX 65). As will be seen from the attached Appendix, Borden's discriminations in favor of A&P on these items ranged from a low of 8.3 percent for quarts of milk to 18 percent or more on half gallons of skim milk. Borden's discrimination on half gallons and gallons of milk which accounted for more

*Initial Decision*

than 55 percent of Borden's sales to A&P range from 9.7 percent to 14 percent.

*H. Injury to Competition*

The attempt to discern the competitive effect of price discrimination has been said to be "roughly akin to explaining how to avoid harm in a snake pit" (Keck, *Lawful Price Discrimination*, 8 *AntiTrust Bull.* 381 (1963)). Here, however, the task is simplified.

86. As A&P admits, "fluid milk is one of the most important commodities carried in retail grocery stores . . . [I]t is a perishable, high-volume, fast turnover item sold by most food retailers. Milk is also a staple and is purchased [by consumers] more frequently than other products [sold in grocery stores]" (A&P Adm. filed March 1, 1973, Par. III-19, 24). This is confirmed by the testimony of non-favored Borden customers (Minard, Tr. 3149); Kristoff, Tr. 2274; Gintert, Tr. 2456; Barnes, Tr. 3861; Barney, Tr. 3686; Lasorso, Tr. 2650; Cox, Tr. 2951-2952). Consumers are familiar with the retail price of fluid milk products and consequently competing retail grocers price milk competitively (A&P Adm. filed March 1, 1973, Par. III-21; Minard, Tr. 3149; Kristoff, Tr. 2277; Gintert, Tr. 2447-2448; Barnes, Tr. 3861-3862; Barney, Tr. 3690; Lasorso, Tr. 2650; Cox, Tr. 3947-3951). Milk products are sometimes used as [26] price leaders which are priced below the normal market price to draw customers to a store where it is hoped the customer will purchase additional products (Minard, Tr. 3153-3154; Kristoff, Tr. 2277-2278; Gintert, Tr. 2458; Barnes, Tr. 3862; Barney, Tr. 3691-3692; Lasorso, Tr. 2652-2653). Selling milk at higher prices than those charged by one's competitors would cause customers to shop at other stores and would hurt business (see foregoing citations).



*Initial Decision*

87. A&P admits that profit margins have been notoriously low in the retail grocery business (A&P Adm. filed March 1, 1973, Par. III-23). This is confirmed by sales and profits summaries of the unfavored competitors of A&P (CX 184, 189, 192, 199A, J-Z, 201, 203). All of the unfavored competitors had pre-tax net profits of less than 5 percent of sales. Four of them had net profits of 2.3 percent or less and one had a net profit of less than 1 percent (see Appendix IV (*in camera*) submitted in complaint counsel's proposed findings).

88. In view of the consumers' consciousness of fluid milk prices, the importance of milk to the grocery store, and the low level of their profit on sales by grocery stores, the purchase price of fluid milk items has been important to the ability of food retailers to price these items at competitive levels. The unfavored competitors of A&P, had they received a larger discount from Borden on milk products, would have increased their net profits and permitted them to be more competitive. Some of them would have been able to lower the retail price of milk to the consumer, increase advertising or otherwise give better service (Minard, Tr. 3154; Kristoff, Tr. 2273, 2278; Gintert, Tr. 2455-2460; Barnes, Tr. 3860-3861; Barney, Tr. 3688; Losoro, Tr. 2653-2657; Cox, Tr. 3950-3951). The price discriminations experienced by the unfavored competitors on their purchases of milk and milk products from Borden when compared with A&P's prices on private label was at least several times larger than those stores' level of net pre-tax profit. In many cases the percentage of discrimination was as high or higher than the stores' level of gross profit on sales. Consequently A&P enjoyed a competitive advantage. Since it did not reduce the retail price of its private label milk, its lower costs were not passed on to the consumer but resulted in higher gross profits for itself (CX 255B; White, Tr. 2059).

*Initial Decision***[27]** I. *A&P's Inducement or Receipt of Borden's Private Label Pricing*

89. There can be little doubt that A&P induced Borden into granting the private label prices. Its behavior as outlined in the section of this decision dealing with the negotiations clearly demonstrates that A&P maintained unwavering pressure upon Borden to arrive at the prices finally agreed upon. It solicited a private label arrangement, first only for its Chicago-Calumet area, then later for its outside areas, it hammered down Borden's successive bids and even when it was informed that the bid was at or close to Borden's costs put the matter up for outside bids. It then informed Borden that its bid was not even "in the ball park." Finally, Borden, desperate to retain A&P business for its new Woodstock plant, made a bid which A&P could not refuse and the deal was closed to begin in November 1965 and to last until February 1972.

*J. A&P's Knowledge that Borden's Bid was not Cost Justified*

90. As detailed earlier in the section of this decision entitled Negotiations, A&P was made aware that Borden's price could not be cost justified. Borden repeatedly told A&P that its price was based solely on meeting competition and that it was intended to meet a competitive bid based on incremental costing. Moreover, Borden first offered A&P an \$820,000 savings covering 13 private label items with an annual volume of \$6.5 million. When A&P insisted that Borden drop its glass gallon feature, Borden revised its bid to cover 11 private label items with an annual volume of only \$5.6 million (CX 56B-G, 62, 75F-J; Tarr, Tr. 884-885; Schmidt, Tr. 1777). A&P should have known that the same cost savings applicable to different products with different volumes would not likely be related to Borden's cost savings.

*Initial Decision*

91. The study of Borden's Chicago-Calumet area costs in July 1965 was made by Borden's cost accountant, Malone, and was submitted then to A&P. This showed Borden's cost on gallons, half-gallons and quarts of milk to be higher than the final price per unit to A&P (CX 24D, 62C). Even when these costs were computed in February 1965, the final prices offered A&P for the two highest volume items, half-gallons and gallons of milk, were lower than Borden's cost (CX 14D).

**[28]** 92. Borden also told A&P that its cost of serving A&P stores outside of A&P's Chicago-Calumet area were higher than its prices. Borden reported its costs for the major whole milk items as follows:

Half-gallon	\$ .3167
Gallon	\$ .6260
Quart	\$ .1584 (CX 21U)

Borden's final offer was substantially below these costs, particularly for half-gallons and gallons (CX 62D-G). A&P should have known that Borden's costs were higher than the final price quotation. In May 1965 Borden's Mr. Malone spoke with A&P's Mr. Schmidt about Borden's costs and showed Schmidt that Borden's gross profit per quart was less than one mill (CX 19E). At that time Borden's cost for paper half-gallons of milk was \$.3162. Borden's final price, averaged, was \$.2866 for half-gallons in the outside areas.

93. Mr. Bartels also knew of Borden's costs having been presented with Malone's calculations (Bartels, Tr. 1869; Minkler, Tr. 203; Malone DTR p. 114).

94. It is also of significance that when A&P asked Borden for a letter stating that its private label prices were

*Initial Decision*

granted to others on a proportional basis, a statement which would have been in conformity with A&P's policy of obtaining such a written statement from suppliers (Smith, Tr. 1428), Borden replied

. . . Our prices are proper under applicable law and we are prepared to defend these prices (CX 263H).

95. A&P's Chicago officials made no effort to determine if Borden's private label prices were to be made available to others (Schmidt, Tr. 1729; Bartels, Tr. 1877).

96. It does not appear that A&P's New York office made any such inquiry (Archer, Tr. 1251). A&P's headquarters buyer for milk and dairy products who reviewed the Borden offer for legality (Smith, Tr. 1347) testified that he understood that Borden's letter did *not* state that Borden's prices were available to others on proportionately equal terms and was *not* the letter of availability that A&P [29] had asked for (Smith, Tr. 1406). He further testified, however, that he telephoned Mr. Archer, and held a conference with him about the Borden letter but that Archer assured him that the letter was a letter of availability and even more (Smith, Tr. 1407). Whereupon, he sent the Borden offer, their letter and a memorandum to A&P's legal department for review and that the legal department responded in writing (Smith, Tr. 1413, 1442). Archer, however, testified that he had no discussions with Smith regarding Borden's final Chicago quotation (Archer, Tr. 1246). Neither Smith's memo to the legal department nor the alleged legal departments' approval were offered in evidence. On balance, I do not credit Smith's version of the actions taken after the receipt of Borden's final offer.

97. A&P's trade experience also should have given it reason to believe that Borden's final price could not be cost justified. It was quite familiar with the dairy industry

*Initial Decision*

and methods of doing business in the industry at the time of the private label negotiations. Their officials had discussed private label milk for Chicago, the pricing of private label milk, Borden's pricing in the market, dairy pricing in the Chicago area as compared to pricing in other cities, private label pricing in other markets, competitive conditions, Borden's costs, etc. (Minkler, Tr. 201, 213, 227; Tarr, Tr. 857, 871, 897; Schmidt, Tr. 1684, 1687, 1692; Bartels, Tr. 1865; Smith, Tr. 1350; CX 7D-K, 12, 19, 22, 25B-E, 30, 31, 34, 43). Admittedly, one of its purposes in seeking private label milk for the Chicago area was to cut its cost of milk below the price it paid for Borden label products (Corbus, Tr. 7325; Smith, Tr. 1400). A&P also purchased fluid milk and dairy products in the Chicago area from other dairies in addition to Borden and must have been aware of the price level for these dairies (CX 256). It also knew that Borden's final private label price to A&P was substantially below Borden's advertised label prices to A&P since it was buying both from Borden.

98. Even A&P's costing guide lines indicated that Borden's private label prices had to be below Borden's cost. In 1964, A&P negotiated for the supply of private label milk by Glen & Mohawk Milk Associates for areas in upstate New York and Massachusetts. The president of that dairy told [30] A&P how a store customer could estimate a dairy's cost. He said that it could sell milk to A&P stores at a cost of approximately 6¢ per quart above the dairy's cost of raw milk. Two of such 6¢ went for cartons or fillers. Two more cents were attributable to plant costs and profit and the last two cents would cover delivery (Abrams, Tr. 6398-6399). Nevertheless, Glen & Mohawk's prices ranged from .28¢ to .65¢ per quart more than the prices Glen & Mohawk told A&P it might expect (RAPX 137A, 62, 63). Moreover, the 2¢ figure for plant costs would not necessarily apply in New York City because wage rates



*Initial Decision*

were higher there than those used in the formula (Abrams, Tr. 6402-6404, 6423). In addition, Glen & Mohawk's offer did not include milk delivery but was a dock pick-up price and did not guarantee delivery costs, the customer taking the risk of delivery (Abrams, Tr. 6388). Glen & Mohawk's delivery cost estimate would not necessarily apply in areas with different union wage rates and was based on an average per store delivery of at least 40 to 50 cases (Abrams, Tr. 6399-6401, 6425-6426). Finally, delivery costs were for sidewalk drop delivery and not for putting milk into the store (Abrams, Tr. 6396). In sum, the "2-2-2 formula" was merely a reference point from which to work and had to be adjusted for different conditions in different areas. A&P was told that in-plant wage rates in Chicago were substantially higher than in New York (CX 25C, 26). The average A&P store was taking less than 600 points or 25 cases per delivery (RAPX 233, p. 8). Union work rules and Chicago Health Regulations forbade sidewalk drop delivery and Borden, not A&P, took the risks of delivery (CX 23D-E, 62). Nevertheless, the final Borden offer granting prices to A&P for half-gallons and gallons of milk were .6 to .8 cents per point below Glen & Mohawk's prices (RAPX 137).

99. After the commencement of the private label contract, it was obvious to A&P that its private label milk costs were below its Borden label milk costs for which it got an effective discount of only 30 percent and not the 35 percent to 38 percent effective discount available on the A&P label products (CX 255B; RAPX 66). This was so, although Borden's services to A&P in connection with its Borden label sales were the same as those rendered in connection with Borden's private label sales. Products of both labels were delivered in the same trucks and in the same manner. Products of both labels were pre-ordered. Borden did not accept returns of either product after ex-

*Initial Decision*

piration of the code date and Borden did not provide any in-store or promotional services (CX 75A-B, RAPX 66, Supplement C, pp. 238-239). Thus, as of mid-November 1965, and thereafter, A&P should have known that its average [31] store in the Chicago Unit took less than 600 points per delivery (CX 24B, 27, 20H; RAPX 233, p. 8) but it was purchasing Borden label milk at a price of \$.3430 per half-gallon and A&P label milk at a price of \$.3124 per half-gallon. In January 1966, Borden offered other customers the same limited service option provided to A&P, provided such other customers took 600 points of milk per delivery. Such other customers, however, had a maximum discount of 30 percent off of Borden's list price. Actually, the discount was 26 percent off Borden's list price plus 1 percent additional for advance ordering and limited service plus 1 percent additional for limitation on returns plus an additional 2 percent for those customers which were centrally billed, for a maximum of 30 percent (CX 123, 138; Gose, Tr. 1110). A&P's private label cost was the equivalent of a discount ranging between 35 percent to 38 percent without regard to the volume taken by any of its stores. Borden's services to all were the same (CX 75A-B, 123, 138). Although Borden's private label contract did not offer salesman's services to handle promotions, its limited service to non-A&P stores also stated that Borden would not provide promotions (CX 123B; Lasorso, Tr. 2699; Barnes, Tr. 3910; Cox, Tr. 3992; Havemeyer, Tr. 9137-9138).

100. It thus is apparent that the only benefit lost by A&P in connection with the private label contract was advertising. But dairy advertising was not a big expense—2 to 3 mills per point or less (CX 54; Soldwedel, Tr. 3387, 3430). Indeed, Bowman told A&P that it could not justify any price difference between private label and advertised label products (Cannon, Tr. 6136).

*Initial Decision*

101. A&P also knew or should have known that its price preference on private label products was increased in May 1966. Then Borden raised its price by \$.0035 (at maximum discount) to cover increased costs of labor, containers and social security costs (Gose, Tr. 1047, 1110; CX 79, 123, 124, 125, 138, 139, 140). A&P refused to accept the price increase except on its Borden label purchases and Borden repeated its request in March and April of 1967. At that time A&P accepted only a \$.002 increase (CX 81, 102, 103, 105, 106, 110, 255B; Gose, Tr. 1052-1058; Schmidt, Tr. 1723).

*K. The Bowman and Borden Competitive Bids*

102. As noted earlier, A&P had only two bid under consideration in 1965, the Borden bid and the Bowman bid. It compared the two bids on the basis of their prices on the private label products offered by Borden which was the only factor in which it was interested.

**[32]** 103. The Bowman bid was based upon a 3.5 percent butterfat content of milk. The Borden offer was based upon a 3.4 percent butterfat content. There is nothing in this record to indicate by what amount Borden would have increased its bid to supply milk with a butterfat content of 3.5 percent instead of 3.4 percent. Similarly, there is nothing in this record to indicate how much Bowman would have reduced its price to supply 3.4 percent butterfat milk instead of 3.5 percent butterfat milk. The two bids are not comparable with respect to butterfat content.

104. The Bowman bid, unlike the final Borden bid, included glass gallons of milk, but any comparison between the two bids based upon glass gallons of milk is improper inasmuch as A&P did not want glass gallons under private label and when Borden attempted to include such product,

*Initial Decision*

A&P told Borden to take it out. Glass gallons were therefore not included in Borden's final offer (CX 62, 66; Schmidt, Tr. 1777; Tarr, Tr. 883-884).

105. A&P argues that any comparison of the Bowman and Borden bids should include by-products which were not offered under private label by either Bowman or Borden. This is also improper inasmuch as A&P was not interested in such items (CX 62; RAPX 50).

106. The Bowman bid was actually inoperative. It was based upon a volume that A&P would not and could not provide. It was based upon an estimated total dollar volume of approximately \$1 million per month using Chicago list prices. Bowman's letter to A&P stated:

A substantial increase or decrease in the size of your order (compared to the assumption of dollar volume set forth above) would affect these prices. . . . (CX 50A; Cannon, Tr. 6149).

A&P's actual purchases using list prices totaled about \$754,000 per month (CX 13A, 17B, C, 13H). This calculation is arrived at by taking the unit volume for one week, annualizing such figure and multiplying the result by Bowman's list prices for such units. Taking into consideration the fact that these calculations were for the early part of 1965 and that A&P's purchase volume declined later in 1965 and thereafter, it is reasonable to infer that Bowman's bid was subject to upward revision by reason of such substantial decline in volume (CX 75Z; Schmidt, Tr. 1684, 1731, 1737). This is confirmed by Bowman's table of price [33] adjustments showing that its prices would be about 2.7 percent higher if A&P bought from Bowman's for only 70 percent of its stores and 3.1 percent higher if it bought from Bowman for only 50 percent of

*Initial Decision*

its stores (CX 50R; Schmidt, Tr. 1761). The Borden offer was not based upon volume (CX 62).

107. The Bowman bid was also inoperative with respect to deliveries. The Bowman bid was based upon three-day-per-week deliveries in the Gary-Hammond area of Indiana (CX 50L). Actually, it delivered milk six days per week in the Gary-Hammond area and could not reduce the days of service because of its union contract (Kalchbrenner, Tr. 9295; Banaski, Tr. 9534; CX 23D, 27, 31A; RAPX 246A). Although the Route Foreman for Borden testified that the union contracts permitted a 4-day delivery, he stated that the practice was 6-day delivery (Szczepaniak, Tr. 1287-1288). The 1965 contract provided that no change shall be made in days of route operation (CX 299i) and the 1967 contract states: "The present delivery system of 6-day operation shall *continue* in effect" (CX 300k, emphasis supplied). It is clear that 6-day delivery was the union practice and the requirement here.

108. In connection with the Bowman bid, A&P admits that it did not ask for and did not receive a letter or statement from Bowman stating that its prices were legal or proportionately available to others (Schmidt, Tr. 1848-1849).

*L. Cost Justification*

109. Joseph Malone, Borden's cost accountant, made several studies to determine Borden's direct costs of serving A&P with private label products. Reference has heretofore been made to CX 24D made in July 1965, in which Borden's direct cost for half-gallons, gallons and quarts of milk is shown to be higher than the final price per unit in CX 62C. CX 87 was prepared in June 1966 after the commencement of the private label program. It shows that while Borden was making a profit on Borden label sales,



*Initial Decision*

it was losing from \$2,200 to \$4,870 per week on the A&P private label business. CX 206 analyzes Borden's Chicago area sales for the 12 months of 1965 and the first eight months of 1966 and shows that Borden's *overall* profits in the Chicago metropolitan area fell precipitously in November 1965 and remained at almost a break even point in 1966, but it did [34] not segregate private label sales which represented more than 25 percent of Borden's Chicago area sales from Borden label sales (CX 42D).

110. Considering that the unfavored customers competing with A&P purchased as much as, if not more than, the A&P store purchased from Borden, that the cost of processing A&P's private label products was no less than its cost of processing the equivalent Borden label product (RAPX 232 Attachment II) and that, except for advertising, no differences in service or delivery terms existed between the labels, but that advertising expense was insufficient to relate meaningfully to the difference in prices Borden charged A&P compared to competing retailers, no price discrimination can be justified under the Robinson-Patman Act. There is no difference "in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which such commodities are sold or delivered." Indeed, Malone's calculations demonstrate the necessary resultant difference in net income because of the unjustified price differentials.

#### A&P'S FACTUAL AND LEGAL CONTENTIONS

##### A. Count I

111. A&P contends that it made no misrepresentations to Borden during its private label negotiations. It notes the testimony of Borden witnesses to the effect that A&P's Schmidt asked Borden to eliminate glass gallons from its

*Initial Decision*

bid because other bidders did *not* bid on glass gallons (Tarr, Tr. 883-884; Minkler, Tr. 245-246). Although Bowman, the "other bidder" *had* offered a price on glass gallons, A&P contends that there was no misrepresentation to Borden. A&P contends that Schmidt was referring to a comparison he was preparing between the Borden and Bowman bids which was based on the earlier Borden bid and which did not include glass gallons. The testimony of Mr. Schmidt, however, is not persuasive. He admits that "my recollection is hazy . . . I believe I recall that I was at that time reflecting the opinion of the Chicago unit, members on my level of management, that we did not want to carry glass private label milk because of the problems at the store level" (Schmidt, Tr. 1777-1778). On balance, I find the testimony of Tarr and Minkler more persuasive. A&P further contends that the reason for not desiring glass was irrelevant [35] because it would not have resulted in the slightest change in Borden's thinking or calculations. But that is not the point. A&P rejected Borden's bid to meet competition on a ground that was baseless, that is, for the reason that Borden's bid included glass gallons, an item which A&P falsely represented to be excluded from the alleged competitor's (Bowman's) bid.

112. A&P also contends that the bid was not induced or altered by a "sharpen your pencil" comment, arguing that it is doubtful that this comment was made at all and, if it was made, it almost certainly was made at a stage in the negotiations when it did not affect Borden's final quotation. This ignores the credited testimony of Mr. Tarr who said:

This thing that I say about sharpening the pencil was just toward the very end of the thing. It was after all these things had been talked about and *before* we brought over the final papers. (Emphasis supplied, Tr. 985).

*Initial Decision*

113. A&P further contends that there was no misrepresentation by it even if it conveyed the impression to Borden that Borden's bid merely met Bowman's bid rather than actually beating it. It argues that, even if the Borden bid was lower by some \$82,000, the difference was less than 1.5 percent of the total business involved and that therefore comments by A&P like "in the ball park" and "substantially met the other quotes" would appear to be quite accurate. The difference in savings between the Bowman and Borden bids amounted to approximately \$145,000. With the adjustment for the increase in raw milk costs, Borden's bid offered A&P a savings of some \$820,000 while the Bowman bid's savings amounted to some \$737,000. The difference in these two savings amounted to some \$82,000 or 11 percent of the Bowman bid savings which is not a *de minimis* amount, particularly in the grocery or dairy business. Even a comparison of the differential in savings to the total business involved, the 1.5 percent referred to by A&P, would not necessarily be *de minimis* in the grocery store industry where net profits of some retailers did not exceed such percentage figures. Here 1.5 percent represented about one-third or more of the unfavored competitors' pre-tax net profits (See Finding 87, *supra*).

**[36]** 114. Perhaps the most meaningful misrepresentation by A&P was that it had a competitive offer with which it could compare the Borden offer. The Bowman bid, unlike the Borden bid, was conditioned upon a certain minimum dollars' worth of sales to A&P. Moreover, the Bowman bid was based upon its assumption that it could deliver three days a week in the Gary-Hammond area of Indiana, but this was incorrect. Bowman delivered milk to stores in this area six days per week and could not reduce its days of service because of the union practice

*Initial Decision*

and requirement that milk be delivered six days per week to stores (See Finding 107, *supra*). It follows, therefore, that A&P actually did not have a competitive bid from Bowman to compare to the Borden bid. Although A&P attempts to minimize these differences and to explain them away, the fact remains that Borden was asked to meet an unrelated bid which was therefore not competitive. A&P's calculations to arrive at a price Bowman would have bid if conditions were identical are conjectural and not factual. They cannot be accepted.

115. There can be no doubt that when A&P accepted Borden's offer it understood that Borden had granted a substantially lower price than that offered by Bowman, the only other competitive bidder if, indeed, there was an offer which could be compared with Borden's (See Finding 55, *supra*). When it told Borden that its offer was being accepted after Borden had told A&P that it was submitted only to meet competition, it misrepresented the situation to Borden.

116. A&P argues that complaint counsel seek to enact "a rule requiring all buyers to tell all sellers who indicate that they are bidding against competitors what the competitors' price is", citing *Beatrice Foods Co. v. Kroger Co., Inc.*, 76 FTC 719, *aff'd* 438 F.2d 1372, *cert. denied* 404 U.S. 871 (1971), as well as *Forster Manufacturing Co. v. FTC*, 335 F.2d 47 (1964). This is just not so. As the court held in *Beatrice*:

The controlling point here is not the 'hard bargaining' nor the price levels but the *misrepresentation* of the Broughton bid, in order to induce a discriminatory price (438 F.2d at 1378; emphasis in original).

**[37]** Here, A&P misrepresented the situation to Borden. It knew or should have known that there was no opera-

*Initial Decision*

tive bid from Bowman. Nevertheless, it told Borden that it had such a bid and when Borden made it quite clear that it was submitting its bid to meet the competitive offer A&P made no effort to disabuse Borden of that belief, although it understood that Borden had beat that bid. There was no obligation upon A&P to divulge the name of the competitor or the actual price offered by a competitor. It was sufficient if it had informed Borden that the meeting competition defense was not available. In failing to do so it misrepresented the situation to Borden and it was this misrepresentation that was a violation of Section 5 of the Federal Trade Commission Act. As the Commission concluded in the Health Hazards Statement (29 Fed. Reg. 8354-8355 (1964)):

In the last analysis, the Commission's responsibility in this area is to enforce a sense of basic fairness in business conduct.

A&P failed to meet that standard. As the Health Hazards Statement further points out:

No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts or practices, but the example should help to indicate the breadth and flexibility of the concept of unfair acts or practices and to suggest the factors that determine whether a particular act or practice should be forbidden on this ground. These factors are as follows: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes sub-



*Initial Decision*

stantial injury to consumers (or competitors or other businessmen). If *all* three factors are present, the challenged conduct will *surely* violate Section 5 even if there is no specific precedent for proscribing it. The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is [38] exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or other.

A&P's misrepresentation was within an established concept of unfairness (see *Beatrice, supra*); it was unethical and it did cause substantial injury to Borden as well as to AP's competitors (See Findings 59, 62-88, *supra*).

117. A&P contends that its conduct caused no injury to Borden or to Borden's employees arguing that Borden's merger of its Chicago Central district with the Midwest District in Columbus, Ohio, was a normal part of Borden's operations in order to improve efficiency levels. This disregards the testimony of Mr. Minkler (Tr. 279-280) which attributed the reorganization to the loss of Borden's income occasioned by the private label contract. That the reorganization had other justification referred to by A&P to improve efficiency does not necessarily invalidate the fact that I have found *supra* (Finding 59), that at least in part the reorganization was prompted by the reduction in income caused by the private label contract. Nor does Borden's 1966 annual report making no reference to the loss of income from the private label contract necessarily invalidate such a finding inasmuch as a company might not regard an annual report to be the most auspicious place to speak of income losses due to a private label contract.

*Initial Decision**B. Count II*

Count II of the complaint charges A&P with knowingly inducing or receiving price discriminations in violation of subsection (f) of Section 2 of the Clayton Act, as amended.

*I. The Discrimination*

118. A&P attacks the calculations made by complaint counsel for the prices paid by non-A&P store customers to Borden for products purchased by A&P under its private label program, arguing that complaint counsel has failed to properly authenticate the underlying Borden rebate information relied upon. It states that the rebate checks relied upon by complaint counsel were incomplete, citing three instances. In Burger's Supermarkets, A&P notes that a second check from Borden was never included in complaint counsel's calculations. The amount of this second check was \$207.63. Even were it to be included, [39] it would scarcely diminish the discrimination suffered by Burger's Supermarket which experienced thousands of dollars in higher costs incurred. A similar inconsequential discrepancy is mentioned in connection with Model Food Center where the rebate check does not tally exactly with the method of calculation. This rebate check amounted to \$79.36 and should have amounted perhaps to \$8.00 more. A&P also objects to complaint counsel's failure to include certain payments by Borden to Wilco and Tittle. These appear to be checks for interest payments with no relation to the volume of purchases by these companies and would have insignificant impact upon the price discrimination calculations.

119. In addition, A&P contends that the documents relied upon by complaint counsel were incomplete. But the subpoena for this information to Borden required all documentation necessary to show the net price to customers

*Initial Decision*

and it appears that such was provided. Moreover, the rebate checks used by the Commission's accountant tallied almost exactly with Borden's worksheets. Under these circumstances it appears that the data used by complaint counsel were authenticated sufficiently.

120. A&P also attacks complaint counsel's calculations for non-A&P customers in Illinois, arguing that discounts greater than those shown on Borden's discount schedule were offered on a customer-by-customer basis. Although complaint counsel's accountant was not able to reconcile the price book amounts with the price lists in some of his spotchecks, it was apparently due to such things as the illegibility of entries and the inclusion of butter which was not on the price list and did not necessarily indicate that these customers were not charged these prices (Bitting, Tr. 4882). Moreover, such additional discounts were apparently given on small volume by-product items and would not substantially alter the overall pricing pattern (CX 288 D,R,S; Bitting, Tr. 4225-4231, 4234-4236; Soldwedel, Tr. 3421).

*II. The Representativeness of the Stores*

121. A&P further contends that while complaint counsel may have shown that A&P's discriminatory price caused injury to those Borden customers discussed by complaint counsel, this showing is not sufficient because these stores were not "representative" of all purchasers from Borden. It is doubtful that complaint counsel has such a burden.

**[40]** In *Beatrice, supra*, the Commission said:

The Robinson-Patman Act requires consideration of secondary line injury on a location-by-location basis. Each local competitive area, each Kroger store loca-

*Initial Decision*

tion, becomes the competitive environment within which the potential effect on competition with Kroger must be examined. (76 FTC at 805)

The Commission noted that in *Foremost Dairies, Inc. v. Federal Trade Commission*, 348 F.2d 674 (5th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965), the only competitive environment examined was the city of Albuquerque, New Mexico, in which were located some eight stores in a small chain which received favored prices. Only one of these stores was located in proximity with an unfavored Foremost customer. Here, local competitive areas were examined. In the Gary-Hammond area of Indiana, A&P's five largest independent grocery competitors paid substantially more than the A&P stores in that area during the six month period from October 1966 through March 1967 and the later ten month period from June 1969 through March 1970. Similarly, the Tittle store in Valparaiso paid substantially more than its competitor A&P store. On the O'Hare route Borden's cash store customers purchasing \$800 or more of milk per month paid substantially more than A&P for fluid milk products sold under private label (See Findings 62 through 77 *supra*; also CX 183). These price discriminations have been found to be meaningful and productive of injury to such non-favored competitors of A&P. In a secondary line competition case, the Supreme Court has said that it is

self-evident . . . there is "a reasonable possibility", that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers (*Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948)).

*Initial Decision*

As the Commission stated:

It seemed self-evident that where a producer is selling a homogeneous product, such as salt, automotive parts, or gasoline, where competition is extremely keen among retailers, and where margins of profit or markups are small, a lower [41] price to one or some of the competing retailers not only 'may' but must have the effect of substantially lessening competition (*Sun Oil Co.*, 55 FTC 955, 962 (1959)).

Although the Seventh Circuit seemed to inject a necessity to make "realistic appraisals of competitive impact" in its decision in *American Oil Co. v. Federal Trade Commission*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964) even that court assumed competitive injury upon a showing of different prices charged competing customers where the differential was "substantial and sustained" (*Bargain Car Wash, Inc. v. Standard Oil Co., (Ind.)*, 466 F.2d 1163, 1174 (1972)). Assuming nevertheless, that the representativeness of the non-favored stores selected by complaint counsel here must be shown, I find that burden to have been met. The discriminations and injuries shown here involved local competitive areas of Gary-Hammond, Indiana, where A&P's five largest independent grocery competitors' costs were compared with the A&P stores' costs in the same area. In the Valparaiso, Indiana, area the Tittle store was compared with its competitor A&P store. In the Chicago and suburbs area Borden cash store customers were compared with A&P stores. In the Indiana area the purchases of the unfavored competitors represented more than two-thirds of all of Borden's non-A&P store wholesale sales in the area (RAPX 234, p. 19; CX 182). In the Chicago and suburbs area, the unfavored competitors chosen represented more than 40 percent of Borden's total sales on its O'Hare wholesale



*Initial Decision*

routes, which in turn represented a major part of Borden's total sales in the Chicago area (Compare RAPX 233, p. 69 Col. (1), with p. 8, 1, 6, Cols. 7, 13; RAPX 76; Bitting, Tr. 4788-4789, 4815-4816; CX 211D; Gose, Tr. 1072).

122. A&P contends that the cost comparisons are defective because they do not compare all of the allegedly injured competitors' dairy purchases from Borden against all of A&P's purchases but only against A&P's private label purchases. In the *Beatrice* case, respondent Kroger raised the same argument. There, however, Kroger, in addition to its private label purchases, was an unfavored purchaser of Beatrice labeled products and argued that its purchases of both lines should be considered in assessing injury. (The situation here is even stronger in that there is no claim that A&P was an unfavored customer in its purchases of Borden label products.) The Commission held:

We think the proper inquiry is whether Kroger by obtaining cheap milk under its own label was given a competitive advantage which it used to potential injury of its competitors (at 806).

[42] The Commission went on to hold that only the Kroger purchases of private label products were the correct measure of competitive injury and discrimination since Kroger's purpose in purchasing private label products was to obtain an overall advantage over its competitors since it used the private label milk "for the benefit of its entire grocery business and not merely to sell against name brand milk in the stores of its competitors." In that case Kroger, as did A&P, purchased private label milk at a cheaper price but sold it at the higher price of brand label milk, thereby reaping higher profits. It did not pass any of its cost savings on to the consumer. Moreover, Kroger con-

*Initial Decision*

tinued throughout the period of discrimination to purchase the various items under both private label and brand label. A&P, however, carried the products in question under both labels for only a short introductory period. From October 1966 on, it purchased little or no Borden label milk products, so that it enjoyed a preferential price on all its milk purchases. Thus, except for a few months, whether or not A&P's Borden label purchases were aggregated with its A&P label purchases would make little difference in the calculation of A&P dollar advantage over its competitors.

123. A&P also contends that complaint counsel's proof of injury was insufficient, arguing that Borden's discrimination in favor of A&P lasted only briefly. This ignores the evidence of record that the discrimination lasted for years. A&P also cites evidence to the effect that the unfavored competitors could purchase milk at prices below those charged by Borden. There is no evidence, however, that such competitors were offered prices which even came close to A&P's substantial discount at the times in question (Gintert, Tr. 2492-2496; Minard, Tr. 3256-3258; Kristoff, Tr. 2329).

### III. *Knowledge*

124. A&P also argues the issue of knowledge. I have already found that Borden's Minkler told A&P that the Borden bid was to meet a competitive bid only and that A&P's Schmidt said that he understood (Findings Nos. 51, 52, 53, *supra*). Moreover, I have found that A&P's officials understood that Borden's bid was "substantially better" than the Bowman offer (Finding No. 54, *supra*). Nor did A&P have any reason to distrust the representations of Borden since it admittedly had a high regard for Borden's cost accounting and legal [43] departments (Finding 22, *supra*). A&P's Schmidt admitted that he considered Tarr, Minkler and Malone of Borden "honest and

*Initial Decision*

forthright" (Schmidt, Tr. 1843). A&P's argument also ignores the fact that it knew Borden's cost savings were made without spreading it to individual products and that when it did make such a spread, it changed the products covered and the prices without changing the savings which could hardly be the result of cost differences attributable to differing methods of sale or different quantities sold. Moreover, A&P realized that Borden removed the statement "these prices are available to all on a proportionally equal basis" from its private label price change tables. Since it was A&P's policy to require such statements A&P should have known or surely been put on notice that Borden's new private label prices were not available to others.

125. A&P also attacks the reliability of Borden's cost studies arguing that they do not reflect savings Borden could expect from the introduction of the private label program. It attacks the Malone studies which show Borden's direct costs to be higher than the final price agreed upon to A&P, arguing that certain inconsistencies and irregularities make these studies unreliable. This position, however, is difficult to reconcile with the testimony of A&P's witnesses who considered Mr. Malone to be expert, forthright and honest. If so, A&P then must have known at that time that the price it had wrested from Borden was below Malone's calculations of cost.

126. A&P relies on Smith's testimony that he was assured by Borden's Archer that Borden's letter was a letter of availability and even more, which testimony I have not credited, preferring to believe Borden's Archer who denied such conversation. A&P contends that Archer must have seen Borden's letter and lied when he said he didn't see it, because, as A&P contends, Archer had all the other materials sent to New York on the negotiations. The evi-

*Initial Decision*

dence shows, however, that Minkler forwarded two sets of Borden's final proposal to Mr. Pentz in New York (CX 64A). Minkler forwarded one copy of the legal letter to Pentz but this transmittal contains a penciled note which does not indicate that Archer was sent a copy of that document (RAPZ 3). Moreover, since Archer had been promoted Executive Vice President of Borden earlier and would not have been as deeply involved in the affairs of the milk division as previously, it is not likely that he would have reviewed the legal letter from Borden. A&P also notes that in 1967 with reference to another bid [44] by Borden it asked Borden what was meant by language similar to that on Borden's legal letter here. On that occasion Borden replied that it meant the price would be available to others. No explanation is offered, however, why similar inquiry was not made by A&P at this time. The fact that Borden gave it such a meaning at another time, later, cannot relate back to an earlier period of time without supporting evidence.

127. A&P disputes that its trade experience would have led it to believe that Borden's final prices could not have been cost justified. I have found, however, that A&P was quite knowledgeable about the dairy industry (See Findings Nos. 97, 98, *supra*). A&P argues also that Borden expected reduced costs as a result of its new Woodstock plant. But we are here concerned with differences in the costs, not expectations which may or may not be realized. Nor is it relevant that A&P could get better prices on private label in other parts of the country. We are here not concerned with other parts of the country. Nor is A&P's reliance upon the costing guidelines of the 2-2-2 formula appropriate where, as I have found, this formula was a mere reference point and was subject to adjustments for local differences which would make it inapplicable to the Chicago area.

*Initial Decision**IV. Meeting Competition*

128. As respects the issue of meeting competition A&P argues that although its officials thought the Borden bid was "substantially better" than the Bowman bid in 1965 its review in 1973 shows that in fact the Bowman bid was better. I have found, however, that the Bowman bid was not comparable to the Borden bid. Unlike the Borden bid it was based upon a certain anticipated volume of sales with a higher cost if the volume declined, which it did. It was also based upon a certain delivery schedule which was impossible of performance due to union practice and requirements. Although A&P attempts to develop the change in the Bowman bid with a corrected delivery schedule, the correction is A&P's estimate and not Bowman's. A&P also adjusts both the Bowman and Borden bids to reflect the same butterfat content of the milk, inasmuch as the Bowman bid allegedly specified a 3.5 percent butterfat content compared to the Borden milk which was 3.4 percent butterfat. Again, this is a correction by A&P and not by either Borden or Bowman. But it doesn't appear that A&P was interested particularly in the butterfat content as long as it met the legal minimum requirements (Schmidt, Tr. 1727-1729). [45] A&P uses Borden calculations to raise Borden's price for 3.5 percent butterfat milk using Borden's adjustment of its raw milk cost. This does not necessarily mean that Borden's price would be similarly adjusted *by Borden* had A&P asked for a different butterfat level. In addition, since the Borden butterfat level was about 3.45 percent anyway (Walker, Tr. 5513) and Borden was desperate to keep the A&P business, Borden would not necessarily make any adjustment in its prices to raise the butterfat content to 3.5 percent (CX 62X; Havensfeyer, Tr. 6779; RAPF 130, p. 134).

129. Above and beyond the foregoing obstacles to an adjustment of the Borden bid to conform to what was felt



*Initial Decision*

to be the Bowman bid, that is, 3.5 percent butterfat content, there appears to be serious doubt that the Bowman bid actually called for 3.5 percent butterfat content. Such was not the impression of the negotiating individuals in 1965 but was only the result of second thoughts generated by a review of the bids at the request of A&P counsel in 1973. The testimony of the witnesses, however, indicates that the Bowman bid was based upon a 3.5 percent butterfat content of the class I raw milk and not the butterfat content of the processed milk (Smith, Tr. 1415-1417, 1445-1450; Schmidt, Tr. 1815; Bartels, Tr. 1897). Indeed, a Bowman official, Mr. Cannon, testified that the Bowman offer did not contain any specifications compelling Bowman to supply at any particular butterfat level (Cannon, Tr. 6187-6188). This was confirmed by the Commission's expert dairy economist (Walker, Tr. 5450-5453). In fact, this expert found that Bowman's butterfat level in 1965 was actually lower than Borden's butterfat level judging from the handler's reports which he examined (Walker, Tr. 5461).

*V. Cost Justification**a. Attacks upon Malone's calculations*

130. With respect to cost justification, A&P first attacks the computations by Malone as erroneous and unreliable. Specifically, CX 54 purporting to show Borden's cost to permit Borden to make an additional savings proposal to A&P is attacked because Malone allocated the costs on a point basis rather than on the individual packages involved. But higher priced and lesser volume by-products are more costly to handle so that a cost computation by the number of units could not clearly reflect actual cost whereas a cost computation by points in which these higher priced and lower volume by-products are given higher point values would be more nearly accurate (See

*Initial Decision*

CX 7A). Moreover, since [46] Malone was seeking to ascertain the direct costs of A&P's business it was sufficient for his purposes apparently to ascertain overall costs and relate them to the A&P volume. That Malone was familiar with costs can hardly be disputed and Malone did consider A&P's volume of business (Malone, DTR pp. 148-151). A&P also attacks CX 54 because the costs therein are higher than CX 4, a Borden calculation of costs pertaining to Borden's operations in Wisconsin in August 1964. But CX 54 relates to Chicago and to 1965. A cost study which is neither contemporary nor based on the same market areas is hardly relevant and cannot be the basis for discrediting CX 54 which was prepared for the correct time period and locality, particularly when it appears that the highest labor rates are in Chicago as against all other dairy rates in the United States (Schaub, Tr. 3305) and where costs are increasing during 1964-1965 (See Resp. A&P's Proposed Findings, pp. 380-381).

131. CX 54 is supported by CX 87, another calculation prepared by Malone some 10 months after CX 54. In CX 87, Malone calculated costs experienced selling to A&P by two different accounting methods and in each case found that Borden was selling private label to A&P at a loss. Although A&P argues that CX 87 does not relate specifically to Borden's cost of serving A&P, citing Malone DTR p. 240, it appears that Malone was speaking of another exhibit, CX 13, at that point. With respect to CX 87, Malone testified:

The three documents representing 87A, B and C were developed in an attempt to reconcile our position as to which would be the best course to follow. Number one, we had the experience with the A&P private label operation and we wanted to see on a general basis, on a general application of the elements of cost, what

*Initial Decision*

our position would be, either lose or gain, and relate to where we would be if we lose all of the business. (Malone DTR 184-185).

132. A&P also argues that CX 87 be disregarded because "the data used to determine the Borden costs shown on that exhibit were unavailable to A&P at the time of trial." This objection is now being raised for the first time in connection with CX 87. A&P's motion to strike CX 87 on November 30, 1973, objected to the admissibility of that document on the ground that it was neither past recollection recorded nor a business record. These objections were overruled (see my Order of March 5, 1974). It ill becomes A&P to show concern for the [47] absence of underlying data to CX 87 literally years after such objection would have been timely and appropriate, that is, when Malone gave his deposition (Malone DTR pp. 229-250), or at least on November 30, 1973, when it moved to strike CX 87.

133. A&P also disputes CX 87 in that it compares the prices of the products sold to A&P on the O'Hare branch. Inasmuch as the O'Hare branch is the highest price area covered by the Borden A&P contract (CX 62) whereas Malone used an average price for all A&P stores including stores with lower prices than those from the O'Hare branch it necessarily follows that the average price arrived at for all will be lower than that at the O'Hare branch.

b. Burden of Proof

134. A&P contends that complaint counsel have not proven that the price discriminations were not actually cost justified and that they have not carried the burden of proof required under Section 2(f) of the amended Clayton Act, citing *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953). Complaint counsel must come forward with evidence which proves both that the prices paid by the

*Initial Decision*

respondent buyer were not in fact cost justified and that the buyer knew or should have known this fact. Where, however, the buyer knows he is receiving a substantially lower price although the quantities in which he buys and the manner and amount of exertion with which he is served by a seller is the same as for his competitors

. . . the Commission need only show, to establish its *prima facie* case, that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitors (346 U.S. at 80).

Even under *Canteen*, complaint counsel have met their burden here. The competitors were charged a higher price for Borden's milk products despite the fact that they took at least as much and often more than the individual A&P store with which they were competing. Further, although their service requirements were in some cases greater than that required for A&P they could have had the identical services but still at a higher cost than A&P was paying. Thus, with all differences in quantity and service eliminated there were no cost differences with the possible exception of advertising which I have found to be negligible in this particular situation.

**[48]** 135. Nor can it be denied that A&P knew or should have known that the methods of service and the quantities it purchased were the same as its competitors. A&P, not a novice in the dairy retailing business, certainly knew that Borden's prices were set according to its price lists and discount schedules. Moreover, it appears that A&P was purchasing Borden label products at the same prices that were charged its competitors. A&P officials and Borden officials discussed pricing patterns in the Chicago area as compared to pricing in other cities and even if A&P did

*Initial Decision*

not see Borden price lists it certainly knew the general contents and could have solicited further information (Tarr, Tr. 857-859; CX 12B, 19). Under these circumstances and in view of A&P's other knowledge of Borden's prices and costs A&P clearly had the duty to inquire to determine whether its prices were legal. In *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F.2d 351, 365-366 (9th Cir. 1966), it was held that "Meyer had a knowledge of at least sufficient facts to create a reasonable suspicion that the payments it received were probably illegal . . . the duty to inquire [thus] arises."

The Commission has held

Where a buyer knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer the Commission need only show to establish its *prima facie* case that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitor . . . However, assuming the matter to involve different methods or quantities if complaint counsel show such facts and circumstances as would have given the buyer reason to believe based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded to him, they would have met their initial burden (*Suburban Propane Gas, Corp.*, 71 FTC 1695, 1698-1699, n. 2 (1967)).

**[49]** A comparison with the *Beatrice* case is also appropriate. In that case complaint counsel were held to have met their burden of proof, relying upon Kroger's market knowledge, the fact that it did not seek evidence of cost



*Initial Decision*

justification from the various bidders, and the fact that Beatrice's pricing to Kroger was on a cost-plus basis, whereas Beatrice was selling to competitors on a list-price-minus-discount basis which was not based on actual costs (*supra* at pp. 820, 821). In that case there was no communication between the parties concerning cost justification. Here, however, Borden submitted detailed cost data and informed A&P that its bid could only be justified on a meeting of competition. By any approach, therefore, complaint counsel have met their burden of proof to demonstrate that Borden's price to A&P was not cost justified and that A&P knew or certainly should have known that such was the case.

*c. Havemeyer's Cost Studies*

136. In rebuttal to the contemporaneous Malone Studies (CX 54B, CX 87A-B) and other cost data (CX 21U, CX 23-25A, CX 206), A&P submitted three basic cost calculations, RAPX 232, 233 and 234. RAPX 232 purports to demonstrate that Borden could have expected to earn a profit on its private label price proposal to A&P. This exhibit purports to calculate the total cost of processing, transportation to branches and delivery to the store, of A&P private label items based on costs of Borden for May 1965 or for other periods in determining some of these costs. It compares such cost to the private label price granted to A&P in September of 1965 to arrive at a calculated weighted margin per point for Borden in its sales of private label dairy products to A&P. It breaks down the total cost into seven categories: direct material costs; processing costs; trailer loading; hauling to branches; truck loading at branches; delivery; and indirect marketing general and administrative costs. RAPX 233 compares Borden's cost of serving A&P stores with that of 28 competitors on Borden's O'Hare routes in March 1966. RAPX 234

*Initial Decision*

compares Borden's cost of serving A&P stores with that of five competing purchasers in 8 store locations in Hammond and Valparaiso, Indiana, in October 1969.

137. These studies were prepared by Mr. Robert G. Havemeyer (Havemeyer), called as a witness by respondent A&P. Havemeyer is a management consultant and a partner in the management [50] consulting firm of Case & Co., and has been with that company and its predecessor firm, Stephenson, Jordan & Harrison, since 1953. His professional career has been very largely devoted to cost accounting in the dairy industry (Havemeyer, Tr. 6770-6775). He did not, however, base his studies upon any personal observations of Borden's operations and based his study upon only a portion of Borden's records which portion had been selected by someone else (Daube, Tr. 6704-6705). He did not partake in the process of selection or even review all of the available documentation to determine the completeness and representativeness of the selection (Tr. 7520). His experience included only one other Robinson-Patman cost justification study presented in a litigated case (*U.S. v. Borden* (Bowman), 370 U.S. 471 (1962)). (Tr. 6769-6775, 9131-9132).

*i. Delivery Costs*

138. Of critical importance is his calculation of delivery costs, being the most important and largest expense item with the exception of direct material costs. Havemeyer originally calculated them using Case & Company's whole-sale milk delivery time standards. Complaint counsel objected to the admission in evidence of such time standards on various grounds. By order dated September 11, 1974, I overruled complaint counsel's objections insofar as they were based upon alleged unreliability, immateriality or irrelevance. However, by order of September 16, 1974, I

*Initial Decision*

sustained complaint counsel's objections to Havemeyer's studies insofar as they were based upon Case & Company's time standards because data underlying the conclusions reached on these studies were not produced (RAPX 232, pp. 89, 76; RAPX 233, pp. 39-66; RAPX 234, pp. 3-10). Consequently, the ultimate conclusions of Havemeyer for the cost of this function have been excluded and no meaningful comparison is possible between his studies and the cost calculations prepared by Malone. (See my Order dated November 20, 1974).

139. A&P nevertheless contends "there is ample evidence in the record to calculate the costs that the Borden Company could have anticipated if A&P accepted the significantly reduced delivery service which was an explicit condition of the private label price proposal". It argues that delivery costs can be calculated using the official Wisconsin Manual. It contends that Wisconsin is within the same region of the Borden Company as the Chicago metropolitan area and that operating conditions within the region will be roughly comparable.

**[51]** 140. The so-called Wisconsin Studies are RAPX 9. Dr. Solverson testified on behalf of complaint counsel in June 1973. The thrust of his testimony was to the effect that a differential in delivery times per unit for different types of delivery services narrowed as quantities per delivery increased. In cross-examination, counsel for A&P offered several exhibits purporting to contradict Dr. Solverson's testimony and these were received in evidence (RAPX 8 through 15). As I noted in my order dated November 22, 1974, these were received in evidence for impeachment purposes.

141. A&P argues that Dr. Solverson testified that the time requirements for effecting full and limited service

*Initial Decision*

deliveries in Chicago would be the same as full service in Milwaukee (Solverson, Tr. 1556). I do not so read his testimony. Rather, it appears that Dr. Solverson was speaking of a pattern or relationship between modified drop and full service in delivery time savings and that it was this pattern of decreasing delivery time savings when volume goes up that is true for a large number of geographical areas. He did not testify that time standards from the Wisconsin Manual or his thesis were applicable anywhere else. Indeed, the Wisconsin Manual and Dr. Solverson's thesis were admitted to show disparities between the two. Moreover, his thesis contained time observations from one additional company not included in the Manual figures (Solverson, Tr. 1601-1602, 1604-1605). There were also differences in the definitions of the various service terms as between this company and those developed in the Wisconsin Manual (Solverson, Tr. 1606). Thus, RAPX 9 shows that one of the functions performed under full service in Wisconsin was stamping merchandise, a service that was not part of full service in Chicago (Pergler, Tr. 5651-5654; RAPX 9, p. 2; RAPX 35).

142. It is, therefore, inappropriate to attempt to establish time standards from RAPX 9. It fails to be precisely applicable to the State of Wisconsin, let alone the Borden experience in the Chicago market area. Even Havemeyer admitted that there were very substantial differences in both the fixed time per stop and the variable time per case as between his New Jersey Study and his Bowman Dairy Study (Havemeyer, Tr. 8183-8187). Thus, even considering RAPX 8 through 15 as not merely admitted for impeachment purposes, they constitute insufficient basis for a determination of Borden's cost in the Chicago area for the periods of time involved in this proceeding.

*Initial Decision*

**[52]** 143. Nor does it appear appropriate to consider a cost justification defense on the basis of standardized costs. We are involved in actual costs, not what the costs should have been. As Havemeyer reported to the Virginia Milk Commission on a study conducted in that state:

The cost of the three principal functions—plant processing, distribution and in-store handling—are independent. That is, a low cost processor could be either a low or high cost distributor; so, also, could a high cost processor. The costs of each of these functions are independent of those incurred by the customers (stores) to which merchandise is delivered. (RAPX 245A, p. II-4).

Following this rationale, it is obvious that a particular dairy such as Borden may be a low cost processor but a high cost distributor or vice versa. Standards would arrive at an average or a mean and would not necessarily be descriptive of any particular dairy without some evidence to associate the activities of such a dairy with the average dairy, which evidence is lacking here.

144. Even if Havemeyer's computations re service-times were acceptable, his calculations re delivery costs appear to be unreliable for other reasons. Some of the activities were improperly computed on a time basis. Thus, Havemeyer allocated driver commissions on a time basis rather than to the volume the driver delivers. But commissions were earned and paid on the basis of volume delivered (Pergler, Tr. 5731-5732; Banaski, Tr. 9560; CX 119J-K; CX 298H-J; CX 299H-K; CX 300H-J). Pergler testified:

The commission that the routemen received was based on their sales not on the time that they put in at an individual store on an entire route.



*Initial Decision*

Banaski testified that wholesale drivers were paid both a salary *and* a commission. The union contracts specified that the salary is determined on a hourly, daily or weekly basis but that the commission is based on the number of points delivered. Havemeyer's calculations result in a higher cost for such activity performed for non-A&P customers and inasmuch as this is apparently incorrect, Borden's cost saving on this function in connection with private label sales [53] to A&P is improper (Lemberg, Tr. 9405, 9408). Similarly, Havemeyer allocated total building expense to the wholesale delivery function and on the basis of the time spent at the store by the deliveryman. In the first place, since all four sales categories were involved—wholesale, bulk wholesale, vendor and retail—only a part of the total building expense should have been allocated to wholesale. Moreover, such expense has no apparent relationship to the time spent at the store by the deliveryman but to the function involved such as loading, storage, etc. (Lemberg, Tr. 9409-9412). Again, Havemeyer allocated the automotive expense of the delivery trucks according to the time spent serving this store by the deliveryman. The proper approach would be to allocate such costs to the products carried since the trucks are used merely to transport the products to the stores (Lemberg, Tr. 9408-9409, 9447, 9451).

*ii. Processing Costs*

145. But even independent of delivery costs, Havemeyer's calculations are not persuasive. Arguing that Malone's costs as shown on CX 54B are unreliable, Havemeyer calculated Woodstock processing costs by multiplying the unit cost experienced by Borden at its two Wisconsin dairies (the so-called Milwaukee operation) by the units produced at Woodstock, arriving at the total expense that Woodstock would have incurred in producing each product had it experienced Milwaukee unit costs

*Initial Decision*

(RAPX 232, pp. 10-12, 21). He then adjusted the costs to reflect the fact that Woodstock's labor costs were higher than Wisconsin's while its non-labor costs were lower (Havemeyer, Tr. 6990, 6998-6999). This approach does not, however, appear to be reliable. We are not here concerned with the processing costs in Wisconsin but in Borden's Woodstock, Illinois plant. Moreover, we are concerned with the period of May 1965 rather than August 1964, the month used by Havemeyer. There is no record substantiation for the propriety of comparing the two. Havemeyer was not shown to be familiar with either of the Wisconsin plants at the time in question and, in fact, was not familiar with the operations of the Woodstock plant. One of the two Wisconsin plants used by Havemeyer was inadequately identified although the calculations of that unidentified plant appeared to be in some respects [54] referable to Woodstock. There was no evidential showing that the Woodstock and the Wisconsin plants had similar product lines, similar labor forces, similar equipment, similar utilization of that equipment, similar management problems, similar volume ratios among the product lines, similar filling machines, similar efficiencies, etc. (Tr. 8100-8111). Moreover, Malone was one of the Borden officials who submitted this study upon which Havemeyer relies. Malone stated, however, that "there is no relationship between the Chicago factors and the Wisconsin factors" (Malone DTR p. 36).

*iii. Havemeyer's Unfamiliarity*

146. Havemeyer's lack of familiarity with Borden's activities also diminishes the value of his calculations concerning rental costs of the Ex-Cell-O machine, which is a filling machine. The allocation of this cost was originally made in accordance with a formula which, however, was

*Initial Decision*

rejected for failure to submit substantiating evidence (Tr. 7397, 7402, 7393). Havemeyer then submitted an alternate method of allocating these costs (RAPX 154; Tr. 8114-9118). He testified, however, that his original method was superior (Tr. 8117) because the alternative was "of an averaging nature". Moreover, since the rental consists of 2 parts—a base rental and a production rental—(Tr. 8131-8132, 8133) and the base rental was paid on a monthly basis but the production rental may have been on a quarterly basis or some other basis other than monthly, we cannot be sure that all machine rental costs are shown in Havemeyer's calculations. His lack of familiarity with Borden's operations makes it impossible for him to supply such information. Malone's informed allocation of this cost in CX 54B and RAPX 65 must be considered superior to Havemeyer's averaging method.

147. There were a number of other areas in which Havemeyer's calculations of cost would not be as reliable as Malone's calculations when one takes into consideration Havemeyer's lack of familiarity with Borden's operations compared to Malone's intimate knowledge of such operations. Thus, in connection with trailer loading expense, Havemeyer discredits Malone's computation where Malone allocated the same expense to gallon glass containers as he allocated to paper gallons (Tr. 8160-8161). Although there were more paper gallons in a case than there were glass, there were also more cases of glass gallons on a pallet (Pergler, Tr. 5632) and there may have been other economies involved [55] in loading the glass gallon pallets of which Malone was aware but of which Havemeyer could not have been aware.

148. A similar difficulty arises in connection with truck loading expense. There Havemeyer attempted to make a determination of the average points of each product that

*Initial Decision*

would be contained in a loaded case relying on his experience of normal practice in the dairy industry (Havemeyer, Tr. 7010-7011). Since, however, he was not familiar with Borden's practices, his computations are not necessarily indicative of Borden's experiences without a determination that such experiences were the normal in the dairy industry. In addition, Havemeyer calculated such costs in contradictory ways. In connection with loading costs in the Chicago area, he included total purchases by the unfavored competitors (the 11 items involved in the A&P private label agreement with Borden and all other Borden dairy products purchased by such stores). In the Indiana study, he considered only the private label items and private label equivalents (RAPX 233, 234). In the latter study, the loading costs were virtually identical. Since this matter involves discrimination on private label items only, the latter study was the only proper approach and would eliminate much, if not all, of the cost differential in this function.

149. Havemeyer's expertise is insufficient to remedy other apparent irregularities of his calculations. Havemeyer attempted to calculate product waste cost but in contradictory ways. He admitted that leakers and product spoiling within date would be product waste (Tr. 7749). He added, however, that this would be a very small part of the product waste which included a privilege to return out-of-date merchandise that was not defective. Consequently, in his profitability study (RAPX 232) he allocated 5 percent of "other delivery costs" to A&P private label (Tr. 7753). In his studies of O'Hare costs (RAPX 233) and Hammond (RAPX 234) Havemeyer took the position that leakers and product spoiling within date are not product waste but were accounted for in some other manner in Borden's bookkeeping system (Tr. 8490). He was unable, however, to cite any record evidence for that state-

*Initial Decision*

ment or from whom that information was obtained. Moreover, there is serious doubt that leakers and product spoiling within date would be only a small portion of the route returns. Competing retail grocers generally testified that they had very few returns (Minard, Tr. 3258; Kristoff, Tr. 2431; Barney, Tr. 3838; Cox, Tr. 4002-4003). Minard [56] testified that what returns his company did have were usually leakers or product spoiling within date. Havemeyer himself indicated that Borden probably experienced a high number of gallon leakers in this period due to the fact that the paper packaging equipment frequently had problems during this period (Tr. 8101).

*iv. Indiana Irregularities*

150. Another apparent irregularity in Havemeyer's calculations concerns Valparaiso sales where he used RAPX 81 and 87 as the source for cost data on the assumption that Mr. Marquardt, (the independent distributor who delivered in Valparaiso for Borden) picked up his milk at the Hammond dock. He was unable to substantiate his position by documentation (Tr. 8641). Marquardt himself never testified as to where he picked up his milk (Marquardt, Tr. 1315-1331). Record evidence associates Valparaiso more closely to South Bend than to Hammond (CX 17K; CX 62I). There is, therefore, insufficient justification for the use of RAPX 81 and 87. But even if there were, the expenses thereon are Borden's expenses dealing with vendors, not with stores served by vendors who sold on their own terms (Marquardt, Tr. 1323).

151. A&P argues that Havemeyer should be permitted to apply Hammond branch costs for vendors for his analysis in Valparaiso. It bases its argument simply on the additional cost it would have to sustain to make still another study for this single comparison. But that is not



*Initial Decision*

the point. A correct study should have been made in the first instance. Havemeyer's cost studies' deficiencies render his conclusion unpersuasive.

152. The Valparaiso study is also misleading. It attempts to calculate Borden's costs in its dealing with Marquardt who was an independent distributor. Borden's records, therefore, show its expenses of dealing with such independent distributor and not of its dealings with the distributors' customers with whom it had no relationship. Accordingly, if Havemeyer were to apply Valparaiso's expenses to stores served by those vendors, all or part of those expenses would have to be shown as applicable in that way. This has not been done. Some of the expense allocated to the non-A&P store in Valparaiso (Tittle), is made up of "provision-bad loans". [57] Any bad loans, however, made by Borden to its vendors would not be attributable to the stores to whom these vendors deliver, inasmuch as the Borden customer involved in the vendor account is the vendor and not the vendor's customer, a result reinforced by the fact that Tittle received no loan from Borden (Minard, Tr. 3223-3224). Nor can selling expense be ascribed to the Tittle store inasmuch as Valparaiso is not on a Borden route, Borden salesmen did not visit Tittle's store there (Minard, Tr. 3207-3208) and Tittle was not even a customer of the vendor which delivered to it (Marquardt, Tr. 1317). Similarly, there is no basis for allocating credit and collection costs to the Tittle store for the additional reason that it was not responsible for any credit loss (Minard, Tr. 3157). Tittle did not pay through a distributor (Marquardt, Tr. 1317). Borden's provision for bad accounts with milk distributors could not be applicable to Tittle. Further, since Tittle was never overdue (Minard, Tr. 3157) there could be no interest on overdue account.

*Initial Decision*

## v. Branch Selling Expense

153. Havemeyer's calculations in connection with branch selling expense—the expense related to the activities of Borden's salesmen—are also questionable. In this connection he estimated the number of points sold to independent stores, thus eliminating A&P sales and sales to schools and other non-store customers from consideration, and arrived at a branch selling expense per independent store point (RAPX 233, pp. 23, 16; Tr. 8492-8494). Such allocation was based on the assumption that the entire time of the salesman was spent in soliciting these particular store accounts and serving these accounts. But Mr. Daube, a Borden executive, testified that the salesmen “contacted new customers. . . . [h]is basic function was to develop and obtain new business for the company” (Daube, Tr. 9226-9227). Such missionary work is part of the selling expense of doing business on the part of Borden and it should be borne equally by all customers, A&P as well, on a volume basis (Lemberg, Tr. 9419-9420). Moreover, there is no record evidence to justify Havemeyer's elimination of non-store customers but only his belief that Borden would have special bulk wholesale salesmen who would call on bulk customers. He admitted, however, that there is nothing in the Borden expense account that shows that the salesmen do not call on non-store customers who are served by the wholesale routes (Tr. 8496-8497). In addition, the Borden-A&P contract provided that “Borden's salesmen's services will be supplied at the store level only, to follow [58] through on a complaint covering such matters as service, product or container” (CX 62Q). But no time has been computed by Havemeyer for such activities. The absurdity of this conclusion is demonstrated by the amount allocable to Jim's Groceries where Borden's salesmen visited maybe once a week or maybe once a month (Cox. Tr. 3992). But Havemeyer's allocations would run

*Initial Decision*

about \$165 for March 1966 (RAPX 233, pp. 23, 31). Nor did Havemeyer give any consideration to the fact that Borden incurred some selling expense in connection with the functions of Tarr and the salesmen who assisted him in servicing the A&P account (Tr. 8503). Yet Tarr spent almost all of his time in serving the A&P account (Tarr, Tr. 845-846, 897, 899). Finally, Havemeyer's approach on this function contradicts the treatment in his profitability study where he allocated some selling expense to A&P private label.

*vi. Failure of Classification*

154. Havemeyer's cost calculations are also flawed by his failure to classify customers in accordance with size, type of store, volume of purchases and other characteristics. In his profitability study he treated all independent stores as having one set of characteristics and A&P stores as having another. Thus, in RAPX 232 p. 89, he established various volume brackets for "other stores" but made no volume analysis for the A&P sales, despite the fact that 10 of the 88 A&P stores listed in the March 1965 breakdown of O'Hare sales took less than 300 points per delivery (RAPX 74). In calculating the number of points per case in May 1965, for all "other stores" Havemeyer examined the route books for 3 out of 17 routes in March 1966 and admitted that "there was not sufficient data to be certain of a variation of the points per case by size of store" (Tr. 7845). While admitting that it was highly unlikely these various size stores purchased the same number of points per case, he explained that "the data was not there unless you went through a tremendous analysis" (Tr. 7850). His resulting figure of 22 points per case for "other stores" is obviously quite arbitrary. Similarly, in connection with RAPX 233 and 234, Havemeyer gave no recognition to different classes of customers with different

*Initial Decision*

cost experiences in connection with his allocations of delivery expense, clerical expense, product waste, selling expense, etc.

155. This failure of classification is hard to understand in view of Havemeyer's prior experience. The one [59] prior Robinson-Patman type cost study made by him was for Bowman Dairy in the case of *U.S. v. Borden*, 370 U.S. 460 (1962). His study was rejected by the Court at 471:

In the [Bowman] study the experts charged all independents and no chain store with these costs. Yet it was not shown that all independents received these services daily or even on some lesser basis. Bowman's study indicated only that a large majority of independents took these services on a daily basis. Under such circumstances the use of these cost factors across the board in calculating independent store costs is not a permissible justification for it possibly allocates costs to some independents whose mode of purchasing does not give rise to them. The burden was upon the profferer of the classification to negate this possibility and the burden has not been met here.

There can be no doubt that there are vast differences between the characteristics of the various customers on Borden's routes, differences in physical size, layout of stores, purchase volume, services received and so on. Even the A&P stores had such differences. Havemeyer's studies here merely repeat the error made in his earlier Bowman study.

156. In the O'Hare and Hammond studies Havemeyer determined costs on an average basis for A&P stores and then compared this average with specific competitors. Thus, in his delivery cost analysis in RAPX 232, he proceeded on the basis that A&P was one single customer. This was

*Initial Decision*

condemned, however, by the Commission in *National Dairy Products Corp.*, 70 FTC 79, 193-196, 207 (1966). The Commission stated:

The Hearing Examiner rejected respondent's cost justification defense, in part, for the reason that discounts to multi-unit purchasers must be cost justified on a store-by-store basis. We agree . . . the averaging of purchases has no relationship to the cost actually incurred in dealing with each store (at p. 194). Thus, the largest independent customer respondent has in this area received only a 6 percent discount whereas a competing chain store unit of [60] the same volume receives 12 percent, not by virtue of any savings in cost to the store but solely by reason of its membership in the chain . . . In practice therefore respondent takes the over-cost justification in delivery to the large stores of a chain and credits this time saved to the smaller stores. In our view this is not a valid costing procedure under the Robinson-Patman Act (at pp. 194-195).

Yet this is exactly what has been done here. A&P stores in the Hammond area range from a low of only 17 plus cases per delivery to a high of 52 plus cases per delivery (RAPX 234, p. 19). Thus, although Burger's Market took more than 78 cases per delivery, the competing A&P store #325 took only 17.68 cases per delivery but this small A&P store was averaged out with larger A&P stores to hide the fact that there was such a huge disparity in size and purchase volume. Of course, by such averaging out, the fixed costs applicable to this store's operation become much less than they would be had the true volume been known since fixed costs are usually allocated on the basis of volume.



*Initial Decision*

## vii. Countervailing Costs

157. Nor did Havemeyer give adequate consideration to countervailing costs—costs necessary for the A&P business but not for other business. Reference has already been made to Havemeyer's failure to consider the expense of Tarr, the Borden employee whose activities were in great measure devoted to the A&P account. But Minkler, Malone, Gose and others in Borden's Chicago office also spent a very great amount of their time in getting and keeping the A&P private label business (Minkler, Tr. 125-279; Tarr, Tr. 849-889; Gose, Tr. 1045-1063; Malone DTR pp. 29-204); some of Borden's home office personnel in New York spent considerable time on that same account (Archer, Tr. 1209-1212, 1228, 1230) but Havemeyer made no special study of these expenses (Tr. 7757-7758, 9699-9710).

158. Moreover, it was often necessary to mix A&P label and Borden label products together on a pallet to make up a full pallet for an A&P store (Pergler, Tr. 5697-5698, 5700, 5702-5704). This mixing had to be done by hand [61] which would involve extra effort and expense which was, however, ignored by Havemeyer who stated that the mixing of products on pallets was done equally for everyone. But Havemeyer has not personally observed this procedure (Tr. 7980), and Pergler's testimony relates primarily to the A&P deliveries.

159. There may have been additional costs for A&P stores involved in connection with clerical expense. Thus, there was a daily delivery ticket for each individual store and a summary billing sheet for a number of stores in an area (Tr. 8484-8485). This additional summarization was not considered by Havemeyer (Tr. 8478-8486, 7716-7730). In addition, Borden had to include the retail price and extend the retail value for each product on a total basis

*Initial Decision*

at A&P's request (RAPX 170, pp. 87-91; A&P Adm. March 12, 1973, p. 2, second par.). Despite this indication of countervailing costs Havemeyer made no study of the effect without which a true cost difference could not be ascertained (Lemberg, Tr. 9421-9422).

160. Furthermore, Havemeyer determined the clerical expense for A&P private label on the basis of the fact that private label represented 11/38's of the number of lines on a summary billing to A&P (RAPX 233, p. 11; Tr. 8478-8479). This ignores the fact that an A&P billing had 38 lines but the competitor's stores billing had at the most 27, the difference, 11, being the 11 private label items which A&P was purchasing but not the competitor stores. Thus, it would appear that clerical costs should have been determined by comparing the number of lines on the billings required for the two different stores which would result in a higher clerical cost in this connection for A&P stores than for the competing stores. In effect, A&P's purchases involved clerical expense in connection with the billing of the private label items, an expense which was not incurred by the competing stores which did not buy any private label items.

viii. General Selling and Administrative Costs

161. Havemeyer's calculations concerning general selling and administrative expense is also questionable. He first ascertained the "overhead cost" which he had selected from Borden's central office accounts (RAPX 233, pp. 5, 6). He then took the sum total of all other functional expenses which he had allocated to O'Hare customers, divided this total into the overhead cost, arrived at a resulting percentage figure and applied the percentage figure to the [62] total costs for the other seven functions which he had calculated for the O'Hare customers. These seven

*Initial Decision*

branch functions, however, did not include production or transportation costs which, according to Havemeyer, totaled about \$270,000 in May 1965 (RAPX 232, pp. 24, 33, 39), where as the branch expenses in March 1966 were calculated as being about \$82,000 (RAPX 233, p. 6). It is only reasonable to assume that the central office would be concerned with the totality of Borden's operation and would spend some time concerning itself with production and transportation costs but none of such costs have been considered in this connection by Havemeyer. Instead, a very substantial amount of the overhead expense is allocated on the basis of the time the driver spends at the individual store since delivery expense is allocated on this basis. Thus, Jim's Groceries was a daily cash basis customer (RAPX 233, p. 69). His monthly purchase volume would be about 10,000 points (RAPX 233, p. 31) and Havemeyer would have this customer credited with having generated about \$41 in expense for the Borden home office staff in March 1966 (RAPX 233, p. 41). Yet it is hardly likely that the home office would have any contact with Jim's Groceries. Similar results would apparently be reached for other cash customers (RAPX 233, pp. 60-63, 66, 69).

*ix. Credit Loss*

162. Still another questionable area with respect to Havemeyer's calculations arises in his treatment of credit loss. Havemeyer estimated the amount related to the wholesale business and allocated it equally per point among the 17 independent store purchasers on the Hammond wholesale routes. The "milk regular" account by Borden included both wholesale routes and retail home delivery routes (Tr. 8818-8819), Havemeyer allocated 12 percent of the expense to retail home delivery customers and 88 percent to wholesale customers (Tr. 8818), but ad-

*Initial Decision*

mitted that if done a volume basis retail sales would account for about 25 percent (Tr. 8819). Havemeyer admits that this is a "bad account" expense record (Tr. 8826-8828; RAPX 234, p. 90) and there are substantial amounts attributed to "legal expense" and "interest overdue accounts". It would appear, therefore, that this account is primarily related to particular customers who are in arrears. With the exception of Wallies, all the independents had been extended credit for a maximum of 4 weeks (comparing the average weekly sales figure with the largest balance shown for each store). This would hardly constitute a bad account nor was it so regarded by Borden who continued to grant rebates to these stores (CX 288-289; CX 188, 191, 194-197, 200, 202). There was then [63] no reason to allocate that account's expenses to customers who had not contributed to such expense and if A&P was not so charged there was no reason for charging the independents, some of whom may have been as financially sound, if not more so, than A&P (CX 189, 192, 199, 203, *in camera*; CX 216-219, 221).

x. Advertising Expense

163. Still another area of doubt involves advertising expense. Four products were involved in this advertising (RAPX 90, p. 3) only one of which was involved in the Borden-A&P private label agreement (Bitting, Tr. 9334). Two of the other three products were sold only under the Borden label and the fourth item was not sold to any of the store customers in this area (Bitting, Tr. 9335). The one pertinent item represented only some \$3,000 out of a total expenditure for all four of \$114,000. Although Havemeyer argues that these advertisements are really advertisements of the entire line of Borden products, not just the named product, it was shown that each of the products involved was a new product which was being intro-

*Initial Decision*

duced and Havemeyer did not know what was said in any of the advertisements (Tr. 9638-9655). Without such information there is no basis for assuming that the advertisements referred to more than the four products named. Even if such advertising represented institutional advertising the expense should be applied to all sales including those of private label since it represented a general expense of doing business and expanding sales (Lemberg, Tr. 9419-9420).

xi. The Availability Argument

164. Finally, A&P contends that complaint counsel seem to argue that even if Borden's prices to A&P were cost justified, A&P does not have a defense unless it can be also shown that those prices were offered on some kind of proportional basis to others. It bases this construction of complaint counsel's arguments on complaint counsel's language to the effect that the cost difference in this case is not due to differing methods or quantities of sale or delivery, which is a requirement under Section 2a of the Robinson-Patman Act, but the difference in availability, i.e., that Borden offered all stores the same type of service spelled out in the Borden-A&P private label contract, but at [64] a much higher price (CX 138; CX 62P-Q). Indeed, I have found that virtually the same service was offered by Borden to its non-A&P store customers (provided they had a certain volume of purchases) but at a maximum discount from list prices of not more than 30 percent compared to A&P's effective discount of more than 35 percent. A&P's logic would require competitors to accept the same service program at much less discount in order to preserve their rights under the Robinson-Patman Act, even if this meant compounding their loss or disadvantage by requiring them to incur more in-store service cost as the result of reduced service from Borden, without



*Initial Decision*

an adequate discount to compensate them for it. As complaint counsel view this argument

a buyer may legally discriminate in price if he wraps up the price package in service terms and offers the same service to others at a much higher, unattractive price, which the competitors cannot accept. The difference in service terms will then justify the price difference (complaint counsel's Proposed Findings, Vol. II, p. 299).

Such an obvious flout of the Robinson-Patman Act cannot be tolerated. Non-A&P stores were offered the same service terms enjoyed by A&P but were required to pay more. There was, however, no difference in Borden's cost savings as between the A&P stores and non-A&P stores receiving the same services. It follows, therefore, that no price differences could be justified thereby. It may be argued that the non-A&P stores did not take the limited service that A&P had and that, therefore, Borden actually experienced cost savings in its dealings with A&P that it did not experience in its dealings with the non-A&P stores. But Borden's preferential discounts were not "functionally available" to the non-favored customers who had to meet certain minimum volume purchases which A&P did not (*Morton Salt Co.*, 334 U.S. 37, 42 (1948)). It appears only proper to make cost comparisons in a seller's dealings with competing purchasers where such dealings are comparable and functionally available. The Act recognizes the need for like grade and quality of items sold. Certainly the same conditions of sale must exist before cost comparisons can be made. With the same conditions of sale offered all purchasers, no differences in costs could arise. A&P's inducement of a preferential price under such circumstances would violate the Act, particularly where, as here, the buyer knows that the price its competi-

*Initial Decision*

tors are obliged to pay for their purchases is one which it, the buyer, refused to pay and succeeded in forcing the seller to reduce to that preferential level.

**[65]** xii. Conclusion

165. I conclude, therefore, that A&P's cost justification studies, RAPX 232, 233 and 234, are so defective and inadequate as to furnish no evidentiary basis for justifying A&P's preferential price for private label items on the basis of Borden's savings in costs.

**VI.** *The "Borden Defense"*

166. A&P argues that since Borden "admittedly" has a defense to a Section 2(a) charge by reason of meeting competition, and complaint counsel have not charged it with a violation, A&P cannot be guilty of violating Section 2(f). It should be noted, however, that Borden has not been adjudged to have a defense to a Section 2(a) charge by reason of meeting competition. Borden simply has not been charged by the Commission which has such discretion in issuing complaints. It cannot be said with certainty that, had Borden been charged with a 2(a) violation, it would have been able to defend such a charge successfully. It has been held that a seller cannot accept a buyer's story (such as one about a competitive offer) without more (*National Dairy v. FTC*, 395 F.2d 517, 528 (1968)) where the court distinguished decisions in *Forster Manufacturing Co. v. FTC*, 335 F.2d 47, 54 (1964), *Beatrice Food Co., Inc.*, 68 *FTC* 286, 350 (1965) and *Continental Baking Co.*, 63 *FTC* 2071, 2164 (1963) in which efforts to verify were found). But even had Borden been able to defend such a charge successfully, the result would nevertheless be insufficient to exonerate A&P under the circumstances. Thus, in the *Kroger* case the supplier, Beatrice, was found

*Initial Decision*

to have not violated 2(a) of the Act. Nevertheless, Kroger, the buyer, was found to have violated 2(f) of the Act:

Kroger [contends] that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of Section 2(f) without there being one under Section 2(a). While ordinarily this may be true—a matter we need not pass upon—it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given “false price information” to Beatrice as to Broughton’s competing bid (438 F.2d at 1374).

**[66]** Here, too, A&P gave false price information to Borden as to Bowman’s competing bid. Although A&P argues that Kroger actively misrepresented the other bid but that A&P had a lower bid from Bowman, the fact remains that A&P represented to Borden that it had a bid which could be compared to Borden when, as a matter of fact, it did not, in view of the volume conditions and delivery conditions. Even if those differences could be ignored and the two bids compared, A&P represented to Borden that Bowman’s bid was lower than Borden’s when, as a matter of fact, A&P itself understood Bowman’s bid to be higher than Borden’s.

*VII. Commerce and By-Products*

167. A&P cites the provisions of the Robinson-Patman Act which make it unlawful

. . . for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either

*Initial Decision*

or any of the purchases involved with such discrimination are in commerce . . .

It is not sufficient that the parties be engaged in commerce, the purchases involved in such discrimination must be in commerce. A&P's purchases from Borden were under a contract which covered sales and deliveries not only to its stores in Illinois where Borden's Woodstock plant was located but sales and deliveries to its stores in Indiana and elsewhere as well. It was not severable. The contract, therefore, covered purchases in commerce because it was multi-state in nature.

168. Moreover, Borden's supply of raw milk came from outside the state of Illinois and its processing into milk products did not interrupt the interstate flow of milk from farm to retailer. *Foremost Dairies, Inc.*, 62 FTC 1344 (1963) *aff'd*. 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Dean Milk Co.*, 68 FTC 710 (1965), *aff'd*. 395 F.2d 696 (7th Cir. 1968).

169. A&P argues that certain of the milk products were so processed as to make them separate and distinct commodities, thus breaking the interstate flow. It refers to products such as whipped cream, sour cream, eggnog, and onion dip, which allegedly were so physically, [67] biologically and chemically different from raw milk that the interstate flow of commerce was terminated at Borden's processing plant in Illinois. Nevertheless, those products were a relatively insignificant part of the contract entered into which was not severable. Whole milk constituted the great bulk of the sales under the contract and did not interrupt the interstate flow from the raw milk supply to the retailer. There is no basis for splitting the contract where the parties have not done so. To allow these insignificant products to control the legality of private label

*Initial Decision*

purchases under such an indivisible contract would have the tail wag the dog.

*C. Count III*

170. Count III of the complaint alleges that A&P sold private label milk and other dairy products at the prevailing retail price level for vendor label milk and dairy products in spite of A&P's lower cost for the private label milk, thus maintaining the existing retail prices for milk and other dairy products. Borden for its part failed to pass on at the wholesale level price reductions similar to the reductions granted to A&P to other purchasers who compete with A&P. Respondents' course of conduct, it is alleged, constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

171. The area involved for purposes of proof of this Count is the Chicago Standard Consolidated Area (SCA) consisting of the counties of Cooke, DuPage, Kane, Lake, McHenry and Will in the State of Illinois and the counties of Lake and Porter in Indiana.

172. A&P ranked third in total sales among the retail grocery chains operating in the Chicago area, its sales in 1965 amounting to 203 million dollars (CX 222A). It was a significant factor in the market and its competitors were careful to monitor A&P's prices (Lasorso, Tr. 2646; Cox, Tr. 3947-3948, 3986; Barney, Tr. 3686; Minard, Tr. 3147, 3152, 3153). Had A&P created a price differential on its private label milk, Scott Lad (a competing grocery) would have had to meet the lower price (Schaub, Tr. 3330).

173. Borden ranked either second or third in Class I milk sales among the dairy companies operating in the



*Initial Decision*

Chicago area. It was an important market factor (Holin, Tr. 2965-2966, 2982-2987; Soldwedel, Tr. 3373-3374; Hitchner, Tr. 3596). Prior to the private label agreement Borden [68] was A&P's principal milk supplier for its Chicago unit and provided approximately 95 percent of A&P's milk supplies (Schmidt, Tr. 1678).

174. A&P and Borden competed with one another in the sale of milk and milk products at retail but the record in this proceeding does not establish clearly the dates of such retail deliveries by Borden nor the extent. Witnesses referred to Borden's retail sales as having lessened and ceased somewhere between 1963 and 1968. Thus, Borden's Gose testified that Borden had "some" retail routes when he left Borden's employ in 1968, but he added "I don't remember exactly, but we had considerably less . . ." (Tr. 1041). Later, however, Gose said that retail home deliveries were phased out "somewhere" between 1963 and 1968 (Tr. 1113). The President of Wanzer Dairy testified that Borden "could have had 21 or 22 routes . . . which means nothing in retail" (Soldwedel, Tr. 3406). The record does not establish with any degree of certainty that meaningful horizontal competition between A&P and Borden at the retail level existed at the time critical to this proceeding, 1965-1968.

175. Borden competed indirectly with A&P at retail by selling at wholesale its Borden brand milk to non-A&P stores competing with A&P at retail (Kuhlman, Tr. 5273). If A&P were to reduce its retail price competing retailers might be forced to lower their price of the Borden label products and seek cost reductions from Borden.

176. A&P had strong motivation to stabilize and maintain prices on milk and milk products. As noted earlier, as the result of its private label agreement with Borden

*Initial Decision*

there was an expectation on the part of A&P to realize an estimated annual saving of approximately 820 thousand dollars. This saving could be realized only if A&P's profit margin was protected by the maintenance of the retail price (Kuhlman, Tr. 5230). A reduction of A&P's retail price would necessarily lower its net savings unless Borden reduced its price to A&P even further. This A&P could not expect. It had no better competitive bids and there was always the realization that there was some point beyond which Borden could not possibly recede despite its need for volume. A&P was also anxious that Borden not grant others the same lower price A&P enjoyed since if this were done, the A&P competitor might lower his retail out-of-store price and A&P might have been obliged to meet such lower price by reducing its retail price, thus losing some of the expected savings.

**[69]** 177. Borden similarly had strong motivation to maintain milk prices. Its newly completed processing plant at Woodstock, Illinois, had a very large capacity and A&P's Chicago Metropolitan Region alone accounted for over 55 percent of Borden's wholesale sales volume (CX 42D). If Borden was to maintain an efficient level of production at Woodstock it had to retain the A&P business (Minkler, Tr. 217; Kuhlman, Tr. 5230). A break in milk prices if A&P would reduce its out-of-store private label prices would harm Borden seriously:

We have said all this before many times, but, we do hope A&P will price this private label and the advertised brand label the same, certainly to begin with. If private label out-of-store is dropped to reflect this 1¢ per point, this market will rock immediately, we think. We believe such a move on their part would destroy the present price level for advertised brands and would add explosive fuel to a war over the differential question. We know some competitors will be

*Initial Decision*

strongly opposed to a difference in price for a private label. One big decision we have to make has to do with how low we will go to force acceptance of a differential. We folded up in Wisconsin because of a "no sales below cost" stipulation in the Wisconsin law. We have no such "out" in Illinois.

This is not exclusively a matter in our interest. We believe retailer's margins would eventually get caught in whatever upheaval takes place. With such a move on A&P's part—instead of an improvement in their overall margin, one point I am making is that their dairy department spread could collapse. If that should happen, they will not have gained anything by bringing private label and, certainly, we will have been knocked to our knees. (CX 7B)

**[70]** 178. In the Wisconsin situation referred to above, Borden was supplying milk to the Kroger stores both under the Borden brand and two secondary labels but at a lower price to Kroger for the milk products under the secondary labels. Kroger then lowered the retail price on these secondary labels which resulted in a chain reaction of price breaks in the prices of other dairies and chains forcing Borden to lower both its wholesale and retail prices on Borden label (Soberg, Tr. 2753-2756, 2759). A&P was also involved in this price war (Soberg, Tr. 2764-2765).

*I—Complaint Counsel's Contentions*

179. Complaint counsel contend that to stabilize and maintain the price of milk in Chicago

"all that was necessary in light of the market structure was for each party to agree or to arrange to assure the other that neither would do anything which would tend to disrupt the Chicago market or any milk prices therein. The agreement and/or arrangement of mu-

*Initial Decision*

tual assurances were comprised of and/or were supported by, *inter alia*, respondents' communications with one another, their exchanges of information, and their market knowledge and market conduct." (Complaint Counsel's Proposed Findings, Vol. I, p. 225)

180. With respect to respondents' communications with one another, complaint counsel cite record evidence indicating some discussion of market sensitivity between them. Thus, on February 9, 1965, Borden's Minkler wrote to Borden's Pentz about a conversation between A&P's Schmidt and Borden's Tarr:

[W]hen Schmidt talked to Tarr yesterday he made it very plain that we had to be right. He said he very much appreciated the sensitiveness of this market and that he did not want to put this private label out for bids (CX 12).

Nor did Borden want this business put out for bids. As noted earlier in Minkler's internal letter (CX 7A, B) Borden was concerned about a "market upheaval" as a result of private label bids and believed that "retailers' margins would eventually get caught in whatever upheaval takes place . . . their dairy department spread could collapse . . . we will be knocked to our knees."

**[71]** 181. Complaint counsel also cite the meeting between A&P and Borden officials on or about May 26, 1965. Schmidt expressed a hope that the private label program might be productive of 500 thousand dollars annually. CX 19F states:

In this regard, it was stressed that this type of product contribution could only result from the continuance of present out-of-store margins on fluid milk products

*Initial Decision*

and referred to the Wisconsin price war. Complaint counsel contend that this comment, taken together with the discussion which took place concerning Borden's narrow profit margins, "was clear warning that A&P should not reduce the retail price on private label milk" Complaint Counsel's Proposed Findings, Vol. I, p. 227). It should be noted, however, that CX 19F does not indicate whether it was Borden or A&P which "stressed" the continuation of present margins.

182. Complaint counsel also cite the language of Borden in its price quotation to A&P in May 1965 (CX 18P). In it Borden says:

In certain areas the primary basic price has recognized the depressed competitive situation prevailing in such markets. Such situations must eventually be corrected. It is considered that any economic improvement that occurs subsequently will be mutually recognized in accordance with the situations.

Complaint counsel's economic expert, Dr. Kuhlman, contends that the parties were discussing prices in the retail market (Kuhlman, Tr. 5232-5233, 5308-5309). According to Dr. Kuhlman:

This constitutes in my mind a very clear and very explicit correspondence regarding the price of milk, and the fact that one of these companies is a supplier of milk to the other one can in no way be used to explain that this is not price fixing (Tr. 5233).

183. Complaint counsel also argue that Borden's right to terminate the private label agreement at any time helped [72] insure that A&P would not choose to alienate Borden as its supplier by reducing the retail price (Kuhlman, Tr. 5234).



*Initial Decision*

184. Complaint counsel also cite the fact that the 820 thousand dollar annual saving offered by Borden to A&P under the private label agreement was not made on any straight discount basis but spread across 11 different product lines and argue that Borden influenced A&P's retail price because Borden determined how much of the savings A&P should realize on any individual product (Kuhlman, Tr. 5233-5234).

185. Complaint counsel also argue that A&P must have known that Borden was not prepared to give the same deal to competitors of A&P inasmuch as it had a constant flow of information regarding Borden's costs in connection with the private label pricing (Kuhlman, Tr. 5231). Similarly Borden knew about A&P's retail prices since A&P generally supplied Borden with its retail prices (A&P Adm. dated March 12, 1973, II D, p. 2).

186. Complaint counsel also cite the fact that when the private label program began and thereafter, A&P sold private label milk and dairy products at the prevailing retail price level for vendor label milk and dairy products. Similarly, Borden failed to pass on at the wholesale level price reductions similar to the reductions granted A&P to other purchasers who compete with A&P in the Chicago area, at least for two or three years after the commencement of the private label agreement with AP (Gose, Tr. 1095-1099).

187. Finally, complaint counsel cite the testimony of Dr. Kuhlman, its expert economic witness, who found a combination between the respondents to stabilize the price of milk (Kuhlman, Tr. 5229-5235). The evidence consisted of "mutual assurances", their post-contract behavior, their spreading of the savings across 11 different product lines and the fact that the agreement was terminable at will.

*Initial Decision**II. Respondents' Reply*

188. It appears, however, that Borden's failure to offer the private label prices it granted to A&P to other customers immediately was because its Chicago sales manager, Gose, was instructed by Borden's law department that Borden could not make such offers to others and still rely on the meeting competition defense of the Robinson-Patman Act (Gose, Tr. 1076). Later, however, when it appeared that [73] Borden's competitors were selling at prices comparable to its private label prices to A&P, Borden solicited business at such prices (Dischner, Tr. 7165).

189. Respondents also cite the fact that John White was sales manager of A&P's Chicago unit at the time and that it was he who established the out-of-store prices without consultation with Schmidt, Bartels or Smith, whose authority was limited to purchasing the products. White did not know of the Wisconsin experience nor had he had discussions with Minkler, Tarr or Malone and was not involved in the private label negotiations (White, Tr. 2058-2063).

190. With respect to the internal Borden letter of December 28, 1964 (CX 7), Borden notes that Minkler spoke of the effect of an out-of-store differential between private and brand labels but notes that it neither called for nor requested any action and that neither the letter nor its contents were disclosed to A&P.

191. With respect to the "sensitivity of the market" which was brought up during the February 1965 meeting between Tarr and Schmidt, Borden argues that it reflected Tarr's fear that competitors might disregard overhead costs in bidding for A&P's business (Tarr, Tr. 872). Minkler also mentioned this to A&P's Bartels later (Minkler, Tr. 213-214).

*Initial Decision*

192. With respect to the notation in Borden's May 1965 price quotation to the effect that "the primary basic price has recognized the depressed competitive situation prevailing" and "any economic improvement that occurs subsequently will be mutually recognized", Borden contends that this does not refer to prices in the retail market but to the fact that in some areas the prices bid by Borden were not based on Borden's costs due to competitive wholesale situations then existing and would have to be adjusted later to a cost basis. Even if the so-called depressed competitive situation referred to prices in the retail market the critical question is whether the "mutual recognition" to be given to any economic improvement thereafter does not necessarily refer to A&P's out-of-store prices but to acceptance of a higher price from Borden by A&P based upon cost rather than competitive situations. In any event, Schmidt told Tarr thereafter that A&P did not want the depressed market in the outside areas to be given special consideration in the bids but that all prices should be based on costs (RAPX 132A-C).

**[74]** 193. With reference to the May 26, 1965 meeting between A&P and Borden officials where A&P expressed its hope for a saving in the amount of 500 thousand dollars using the private label agreement and it was stressed that that amount could result only from the continuance of present out-of-store margins on fluid milk products (CX 19F), Borden rejects complaint counsel's interpretation of this language as a "clear warning" that A&P should not reduce its retail price. Borden's Malone testified that the statement was made to disabuse A&P of any possible belief that Borden would guarantee those savings and support A&P in a price war (Malone DTR pp. 217-218). See also Smith's testimony on rejecting Borden's July bid.

*Initial Decision*

[W]e didn't have any protection in case of a price war. If a price war broke out and we had to meet competitive retails for some period of time, that would be our expense instead of Borden's expense (Tr. 1361)

194. With respect to the spread of the savings over 11 different private label items, Borden notes that each item was ordered separately on a demand basis and that a single price for one year's purchases of all 11 items could not therefore be quoted.

195. Borden also disputes complaint counsel's conclusions on the terminable-at-will provisions of the private label agreement, arguing that such contracts are pro-competitive. It notes that the National Stores shifted from Dean Dairy to Hawthorn-Mellody, A&P from Bowman to Borden, Jewel from Borden to Dean, Hillman from Capitol to Wanzer, Wieboldt from Bowman to Wanzer, K-Mart from Beatrice to Borden and Eagle to Borden (Schaub, Tr. 3109); Soldwedel, Tr. 3392; Dischner, Tr. 7170-7175; Douglas, Tr. 3508-3510; Schmidt, Tr. 1765-1766; Gose, Tr. 1102). It also cites Borden's attempt to secure Kroger's milk business in 1965, 1966 and 1968 as well as its proposal to supply Consolidated Food, K-Mart, White Hen, National and Eagle (Gose, Tr. 1089-1102, 1131, 1170; Malone DTR p. 224-226; Markham, Tr. 7041). Moreover, Borden notes the inconsistency in complaint counsel's argument that Borden was dependent on A&P's business for the efficient operation of its Woodstock plant and Borden's situation was so precarious that it was compelled to grant whatever concessions A&P demanded, while at the same time complaint counsel argue that Borden was independent enough to use the terminable-at-will provisions of the contract with A&P to terminate the contract immediately if A&P lowered its retail price on private label milk.

*Initial Decision***[75]** III—*Conclusion*

196. It is well settled that all combinations having any tendency or effect to tamper with price structure are unlawful. *U.S. v. Container Corp.*, 393 U.S. 333 (1969); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *U.S. v. Parke-Davis & Co.*, 363 U.S. 29 (1960). The essence of a combination is the existence of concerted action between the parties, *U.S. v. Container Corp.*, *supra*. The test is not so much the manner in which the parties combine as that there be a "collaborative element present" *Pearl Brewing Co. v. Anheuser-Busch, Inc.*, 339 F.Supp. 945, 951 (S.D. Texas 1972).

197. Complaint counsel cite the decision in *Sunny Hill Farms Dairy Co. v. Kraftco Corp.*, 381 F.Supp. 845 (E.D. Mo. 1974), arguing that the facts there were remarkably similar to this situation. Complaint counsel argue that *Sunny Hill* was a case in which the supplier, Sealtest, was asked to provide the buyer, Malone & Hyde, with private label milk at a lower cost than Sealtest sold its own brand label to it. Subsequently Sealtest and Malone & Hyde engaged in discussions concerning price wars, depressed markets and limited retail price differentials; the court found an agreement between the defendants to fix prices at both the vertical and horizontal levels. Complaint counsel cite the testimony of one of the witnesses to the effect that Sealtest advised the buyer to guard against getting into a price war by lowering the price of milk. They also cite testimony in the *Sunny Hill* case to the effect that there was conversation between the defendants about the out-of-store price. Counsel for A&P, however, point out that by order dated July 19, 1974, the Judge in the *Sunny Hill* case withdrew and vacated his memorandum and dismissed the complaint. Nevertheless, complaint counsel urge the logic of that decision. A&P points out, however, that in *Sunny Hill* the court found that the defendants were



*Initial Decision*

independent and *competing* suppliers of milk to certain grocery stores which followed the recommendations of Malone & Hyde. Thus, Malone & Hyde had certain limited control over the marketing programs of such stores. The court then found that the "record is replete with evidence indicating that Sealtest and Malone & Hyde *agreed* upon the into-store prices of their competitive products" and found illegal horizontal price fixing in such agreement *between competing milk suppliers*, Sealtest and Malone & Hyde. As respects the fixing of out-of-store prices, [76] the court found that Section 1 of the Sherman Act was violated by a "*commitment* to a common scheme or to some type of joint action . . . stated in another fashion the quint-essential yardstick for conduct deemed violative of Section 1 is whether or not there is a collaborative element present". The court added:

An agreement to fix the maximum resale price is also proscribed because "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." . . . the eclectic criteria that can be gleaned from these cases for the ascertainment of a violation is whether the agreement or conduct interferes with the freedom of sellers or traders in such a manner as to *prohibit or restrain their ability to sell in accordance with their own judgment*, and not what particular effect the agreement or conduct has on the actual prices (Emphasis added).

The court then noted that Malone & Hyde sought a price differential in the two different labels of milk whereas Sealtest was desirous that the two labels be priced the same. The parties, however, finally agreed to a price differential. Thereafter, the court found that there was the necessary implementation to effectuate actual retail price

*Initial Decision*

maintenance by Malone & Hyde's control over its affiliates saying "there is direct evidence that *Malone & Hyde dictated the out-of-store price* to its affiliates." The court found in *Sunny Hill* that there was "more than a mere non-biding resale price recommendation but a subtle mode of dictating resale price."

198. Thus, aside from the fact that the Judge in *Sunny Hill* withdrew his memorandum and vacated it, the logic of his earlier position is apparently inapplicable here. Unlike *Sunny Hill*, there was no express or explicit agreement between A&P and Borden concerning A&P's price differential for private label milk. The agreement, instead, was limited to the Borden price to A&P for such private [77] label milk and the differential in such cost compared to the Borden label cost to A&P. Although there was some discussion of price both in this case as well as in *Sunny Hill*, there is no reason to assume that the court in *Sunny Hill* would have reached the same conclusion absent a finding of an express agreement between the parties concerning a price differential on resale.

199. Here Borden as well as A&P had the same objectives in mind: the maintenance of the Borden label level of prices for the private label products. For Borden this was preferable because it avoided the likelihood of a price war in which retailers would seek financial help from Borden, their supplier. For A&P this was also preferable because it maximized their profits on dairy items by lowering the costs of some of them. Under such circumstances had the parties then agreed to the maintenance of such level of prices there would of course, have been a violation of law. There is, however, no evidence in this record which would suggest that Borden ever spoke to A&P about A&P's resale prices on private label items except to note that a differential might create problems. A&P never gave

*Initial Decision*

Borden any assurances that it would not create such a differential. The "mutual assurances" on which complaint counsel rests Count III of the complaint are not found in this record. It must be borne in mind that A&P approached Borden about private label milk in an effort to maximize its profits in dairy products by securing the private label at a lower cost. It was only natural, therefore, for A&P as well as for Borden to note the mathematical fact that if A&P lowered its price on private label milk it would not realize the increase in profit that it sought since the demand was inelastic and lowering the price would not increase sales (Markham, Tr. 7038). This realization constitutes no assurance from either party. Similarly, it was an open secret that Borden needed the A&P business or something its equivalent for the efficient operation of its new Woodstock plant. Consequently Borden would go to great lengths to avoid losing such a customer including a reduction in price to a level it felt its competitors might offer in an effort to lure the A&P business away from Borden, that is, to a level which barely covered, if at all, the mere direct costs. Borden's failure to offer similar savings to other chain stores immediately thereafter has been explained and there appears nothing unreasonable in this point of view. In short, [78] the behavior of the respondents in pricing the private label items was the behavior that one would expect of any rational businessman independently pursuing only his self-interest in markets such as those found in this case. The circumstantial evidence of agreement is equally consistent with a finding of independent action.

To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is not

*Initial Decision*

sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions (*Pevely Dairy Co. v. United States*, 178 F.2d 393 (9th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950).

See also *Virginia-Carolina Peanut Association*, 51 FTC 1156, 1188 (1955).

200. A&P's failure to pass on to the consumer its savings on private label milk are not necessarily indicative of any collusion. As complaint counsel's witness Kuhlman put it:

The non-collusive oligopolist in an industry having a relatively inelastic demand will be unlikely to pass the benefits of cost reduction programs on to the consumer (Kuhlman, Tr. 5312).

201. I conclude, therefore, that complaint counsel have not met their burden of proof to show that the respondents herein have combined to effect a stabilization and maintenance of prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

#### D. *The Denial of Due Process*

##### I. A&P's Contentions

202. A&P contends that it has been denied procedural due process in the presentation of its defenses and in its ability to cross-examine complaint counsel's witnesses due [79] to the loss of witnesses and documentary evidence that would have been available but for the Commission's delay in issuing the complaint. The Commission ruled on January 19, 1973:

*Initial Decision*

. . . The time taken to conduct the investigation leading to the issuance of the complaint herein is neither atypical nor inordinate, particularly in view of the complexity of the investigation and the limited manpower available to the Commission for conducting investigations in connection with its varied and broad statutory responsibilities. Moreover, it seems clear from the pleadings and affidavits before us that respondents were timely alerted to the fact that the Commission was interested in the private label arrangement between them in the Chicago trading area from the standpoint of possible violations of the amended Clayton Act and Section 5 of the Federal Trade Commission Act. And there is no indication that either A&P or Borden was ever advised that the Commission had abandoned its investigation. On the contrary, the papers before us clearly indicate that attempts to pursue and complete the investigation were made by Commission's staff on a continuing and regular basis during the period March 1967-December 1969.

The Commission went on, however, to note that

. . . the question of alleged unfair prejudice to A&P by possible denial of adequate opportunity to defend is one which cannot be answered now, but only at the conclusion of hearings.

a. The Unavailability of Documents

203. A&P contends that its defense in this case was hampered because its subpoenas proved unfruitful and that the lack of response thereto was occasioned by loss or destruction of documents due to the passage of time. In this connection, it offered RAPX 135 and 136, being summaries of the subpoenas directed to retail stores and



*Initial Decision*

dairies, respectively. In these exhibits there are repeated references by the deponents of the subpoenas involved that "no documents are available" in response to [80] certain specifications of the subpoenas. It does not appear, however, that the unavailability of the documents was necessarily due to the passage of time. Thus, at page 7283 of the transcript Mr. Dembrow, an attorney for A&P, was asked why documents not produced were "not available". The following testimony then took place:

"The Witness: No, I would have no other information as to why they did not supply us with the documents. All I know is we never received any documents that were responsive in whole or in part to the specifications in question.

Judge Hinkes: And that we are not to assume from that type of a response that the documents ever existed or were destroyed earlier or were simply not found by the Respondents or any other reason for their non-response?

The Witness: Well, I think in general, Your Honor, that is correct . . ."

\* \* \*

"Judge Hinkes: All I am saying is do we have any evidence—I don't want the assumptions now. Does this document contain reasons for the non-response in evidence?

The Witness: No, the reason for non-response is not indicated except in those few instances where I think Complaint counsel pointed to one that was not in the Chicago metropolitan area. Something like that or one that was not selling to wholesale stores.

Judge Hinkes: I am only speaking now of the responses where nothing was said except 'No documents available' and was signed by the dairy.

[81] The Witness: That simply means that we physically . . . by 'we' I mean the respondents—cannot re-

*Initial Decision*

ceive documents or information in letter form that pertained to specific items in our subpoenas.

Judge Hinkes: And this exhibit contains no explanation for that failure, is that correct?

The Witness: That would be correct, Your Honor."

204. In many instances the records sought were never kept or, if kept, were only so maintained for a brief period of time and then discarded. See, for example, the affidavit of Bruce Spear, an attorney for A&P, constituting an attachment to A&P's motion of October 13, 1972, to dismiss the complaint. In it, Mr. Spear relates his interviews with certain retail store operators. Some of them spoke of discarding records after maintaining them for only two to six months. Others discarded records after their replacement by more current schedules. Still others discarded them after completion of the tax audit. Another said that he doubted that records were kept other than on a current basis.

205. It is thus clear that even had the complaint been issued within a reasonably short period of time following the commencement of the investigation such records would have been unavailable even then and their unavailability to A&P when the complaint was issued years later cannot be the result of the passage of such time.

b. The Unavailability of Witnesses

206. A&P also contends that as a result of the delay by the Commission in instituting this proceeding the testimony of certain individuals who died in the interim became unavailable. Thus, Joseph Malone, Borden's Vice-President, Regulatory Controls, and formerly Comptroller, died prior to the start of hearings in this matter. His deposition, however, had been taken by complaint counsel

*Initial Decision*

and it was received in evidence (CX 262). A&P contends, however, that it had not yet begun its program of discovery when the deposition was taken nor had it begun its cost study of the private label [82] prices received by A&P. Consequently, "detailed probing examination of Malone which was essential to the proper resolution of the various issues surrounding Borden's cost of serving A&P and the cost of serving its non-A&P customers . . . was not possible".

207. Complaint counsel filed their application for taking the deposition of Mr. Malone on November 4, 1971. Said application was granted by the Administrative Law Judge by order dated November 8, 1971, in which the Judge noted:

The application states the complaint to involve a private label milk arrangement between respondents A&P and Borden beginning in 1965 and continuing to date. The negotiations giving rise to the agreement are stated to extend back to 1964 with the three principal negotiators for Borden during 1964 and 1965 to be now retired from said company. . . . The three negotiators are described as now being elderly and their testimony to be of importance to proof of the charges of the complaint. [One of the three negotiators was identified as Joseph Malone]

The order went on to describe the nature of the expected testimony in considerable detail, specifically referring to "Borden's relationships and dealings with A&P and competing retail grocery purchasers in the Chicago area . . . The witnesses' own roles in the dealings with A&P concerning the Chicago area private label arrangement . . . the pricing and sales practices of Borden in connection with its sales to A&P and competing purchasers in the Chicago area, etc." Pursuant to said order Malone first

*Initial Decision*

took the stand on December 3, 1971. Counsel for each of the parties attended said appearance but due to a dispute regarding Malone's request for immunity his testimony was then postponed until February 9, 1972. At that time Malone was examined by complaint counsel and cross-examined by counsel for both Borden and A&P.

208. Considering that A&P was on notice of Malone's testimony as early as November 8, 1971, attended Malone's first appearance on December 3, 1971, as well as his actual testimony on February 9 and 10, 1972, at which time it participated in the examination of the witness; considering [83] also that A&P under the Commission's Rules was also entitled to take the deposition of Mr. Malone at any time either for discovery purposes or to preserve evidence but failed to do so; and considering also that A&P was able to use Mr. Daube who worked for Borden in the Chicago central district from 1958 until 1966 as Chief Accountant and Assistant District Controller and then became Assistant to the District Controller when the Chicago Central District was merged with the Midwest District in Columbus, Ohio (Daube, Tr. 5864-5870), I conclude that A&P's failure to examine Mr. Malone prior to his death is attributable to its neglect or failure to take advantage of the opportunities and rights it had as a party to this proceeding and in any event, was not prevented by any delay in the institution of this proceeding.

209. A&P also claims prejudice to its case resulting from the unavailability of David Parmalee, Bowman's Senior Cost Accountant, who died prior to the start of hearings. It appears, however, that A&P interviewed Mr. Parmalee after the complaint was filed and it is only reasonable to assume that if Mr. Parmalee's testimony would be helpful, A&P would have followed complaint counsel's example with Mr. Malone and taken his deposition as well (affidavit

*Initial Decision*

of Denis McInerney, October 13, 1972, page 13). Moreover, A&P admits that Parmalee's testimony would have merely supplemented Cannon's testimony who did appear and testify (A&P Proposed Findings, Volume 1, p. 508). Here, too, therefore, A&P's failure to have Parmalee's testimony is due to its own oversight rather than any delay in the institution of this proceeding.

210. A&P also cites the unavailability of the testimony of L. Edward Hart, an attorney who worked very closely with Bowman's management in connection with a court order prohibiting discriminatory prices by Bowman. Mr. Hart died prior to the start of the hearings but it is doubtful that his testimony would be received in evidence inasmuch as a claim of privilege in connection with his work as an attorney for Bowman could be expected. Moreover, the testimony of Mr. Hart, like that of Mr. Parmalee, would have been only supplementary to that of Mr. Cannon who did testify (A&P Proposed Findings, Vol. 1, p. 508).

211. A&P notes that testimony of two other witnesses was unavailable due to their deaths prior to the start of hearings. One of these was Walter Roney, Chief Executive Officer for High-Low Foods. His death, however, occurred in 1969 (A&P Proposed Findings, Vol. 1, p. 501). The [84] unavailability of his testimony, therefore, can hardly be attributed to any unreasonable delay in the institution of this proceeding. The other witness referred to by A&P is Fred Nonnamaker, a former Bowman Company employee who died prior to the filing of the complaint. It was his death that prompted complaint counsel to seek the depositions of Messrs. Malone, Minkler and Tarr on November 4, 1971. Presumably, complaint counsel was seeking testimony which could be used against A&P and this could explain A&P's failure to seek Nonnamaker's

*Initial Decision*

deposition any earlier. In any event, his unavailability is a loss to all of the parties in this proceeding. A&P has failed to demonstrate any particular prejudice to it as a result of his death prior to the start of hearings.

212. The record in this proceeding makes it clear that both A&P and Borden were aware, even before service began under their contract, that their private label arrangement would probably result in litigation (Smith, Tr. 1429). Certainly, the Commission's investigation of this case was brought to the attention of Borden and A&P as early as February 1967 when an attorney-examiner for the Commission contacted both respondents requesting certain data and supporting interviews with company personnel concerning the private label agreement between the respondent and possible violations of the Clayton Act and the Federal Trade Commission Act. All of this has already been called to the attention of the Commission in connection with A&P's motion to dismiss the complaint filed on October 13, 1972, and complaint counsel's answer thereto filed on October 20, 1972. If, indeed, A&P failed to prepare itself for its defense to the complaint that was issued later, its failure must be deemed the result of its own oversight and neglect, having been repeatedly put on notice and having obviously realized even before the commencement of the private label agreement that some litigation was likely in connection therewith. The Commission took steps to prepare for such litigation although it, too, experienced the loss of some witnesses and data. For example, potential witness Nonnamaker died before his deposition could be taken. He had testified in the Dean-Bowman case, Docket 8674 to the effect that Bowman's relationship with A&P was such that it could not expect to obtain any A&P business under any circumstances (Docket 8674, Tr. 2207-2208). ("Bowman couldn't get [the



*Initial Decision*

A&P account] if the Lord Himself were their solicitor"). Such testimony in this proceeding would have demonstrated that the Bowman offer to A&P was a sham and could not be used legitimately by A&P for a meeting competition defense.

**[85]** 213. I conclude, therefore, that there has not been an unjustifiable delay in the filing of the complaint considering the difficulty the Commission experienced in marshalling its evidence from the respondents. As the Commission noted in its order of January 19, 1973,

The time taken to conduct the investigation leading to the issuance of the complaint herein is neither atypical nor inordinate, particularly in view of the complexity of the investigation and the limited manpower available to the Commission.

In addition, any prejudice experienced by the respondents herein by the passage of time between the commencement of the investigation and the issuance of the complaint herein, appears to be minimal and the result of the respondents' indifference to the likelihood of litigation resulting from their private label agreement which they themselves anticipated and which was brought to their attention by the activities of the Commission as early as February 1967.

**CONCLUSIONS OF LAW**

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents The Great Atlantic & Pacific Tea Company, Inc., (hereinafter A&P) and Borden, Inc. (hereinafter Borden).

2. The complaint herein states a cause of action and this proceeding is in the public interest.

*Initial Decision*

3. Respondent A&P in the course and conduct of its business in commerce has acted unfairly and deceptively in purchasing milk and dairy products from Borden in that it accepted a price offer from Borden tendered on a meeting competition basis when in fact such meeting competition defense was not available and without informing Borden of this fact in violation of the policy of Section 2 of the amended Clayton Act and in violation of Section 5 of the Federal Trade Commission Act.

4. Respondent A&P in the course and conduct of its business in commerce has knowingly induced or received a discrimination in price in the purchase of fluid milk and other dairy products in violation of subsection (f) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

**[86]** 5. Complaint counsel have not satisfied their burden of proof to show that respondents A&P and Borden in the course and conduct of their business in commerce entered into a combination which had a tendency or effect of stabilizing and maintaining prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act.

**THE REMEDY**

As a result of the failure of proof in connection with Count III of the complaint, a dismissal of said Count will be ordered.

As respects Count I of the complaint, complaint counsel propose that A&P be directed to inform prospective suppliers who submit prices on a meeting competition basis if the price offered beats existing competitive offers. It is contended that such requirement does no more than obli-

*Initial Decision*

gate A&P to comply with its statutory duties. The order proposed, however, would cover not only milk and other dairy products but any product. Moreover, if A&P informs a supplier that a competitive offer has been made to A&P and a supplier makes an offer based on the meeting of the competitive offer, A&P would be required under the proposed order to notify the supplier that the price being offered is below the existing competitive offer to A&P if such be the case.

With respect to Count II of the complaint, complaint counsel's proposed order would direct A&P not to violate Section 2(f) of the Robinson-Patman Act again in any product line rather than merely in milk and other dairy products. Moreover, the proposed order would prohibit A&P's inducement, receipt or/and acceptance of a net price which it knows or should know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers competing with A&P unless A&P *shows* that it knew or had reason to believe that the price difference in its favor was cost justified on the basis of differing methods or quantities or said price was granted to meet a lawful equally low price of a competitor.

With respect to the proposed coverage of all products in both Count I and Count II of the complaint, complaint counsel contend that A&P's violation was "not an isolated incident relating to milk. Rather it was an action in the context of A&P's entire business"; and that without such coverage "A&P could easily evade the order simply by turning its attention to other areas in its diverse product line where similar anticompetitive practices would be equally fruitful".

[87] It is well settled that the Federal Trade Commission has wide discretion in its choice of the remedy adequate to cope with the unlawful practices disclosed. *FTC*

*Initial Decision*

v. *Ruberoid Co.*, 343 U.S. 470 (1952). The validity of the Commission order is gauged by its reasonable relation to the unlawful practices found to exist. *FTC v. Colgate-Palmolive*, 380 U.S. 374 (1965); *National Lead Co. v. FTC*, 352 U.S. 419 (1957). A&P points out, however, that the Commission itself has recognized situations where a broad order would not be appropriate, *Quaker Oats Co.*, 60 FTC 798 (1962). In that case the order was limited to "cat food and products related to cat food". Similarly, in *National Dairy Products Corp. v. Federal Trade Commission*, 412 F.2d 605 (7th Cir. 1969) the order was limited to the product line of the single division found to have made the unlawful discriminations. See also *American Home Products Corp v. Federal Trade Commission*, 402 F.2d 232 (6th Cir. 1968).

It is particularly noteworthy that complaint counsel have drawn a parallel between this case and the *Kroger* case, 76 FTC 719 (1969). There, as here, the buyer went beyond the bounds of permissible bargaining by misquoting the competitive offer or failing to convey correct information. The order issued in the *Kroger* case was limited to milk and other dairy products despite the fact that Kroger, a national grocery chain, obviously had other products which could be subject to the same abuse. In that case, however, the order was not limited to the Charleston division of Kroger where the discriminations took place but to "outlets operated by respondent". Consequently, the order herein will be limited to fluid milk and other dairy products but will apply to A&P's outlets wherever operated by A&P.

As respects Count II, A&P argues that it cannot comply with the order proposed by complaint counsel because of the burden on A&P. It contends that it would be enjoined from receiving a net price on any product which it knows or should know is below the net price at which the product is being offered to any A&P competitor unless A&P is able to demonstrate that it knew or had reason to believe

*Initial Decision*

that the lower price to A&P was cost justified or that the lower price was given to A&P to meet a lawful, equally low price offered to A&P by another supplier. It argues that this would require A&P to cost justify its suppliers' prices, [88] a burden which cannot be properly placed on a buyer who cannot obtain the costing information required (*Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953)).

A&P, however, confuses the burden of proof requirement with the obligation of law. A&P cannot induce or accept a discriminatory price from a supplier where it knows or has reason to know that the lower price to it cannot be cost justified or that the lower price given to it was not to meet a lawful equally low price offered by another supplier. The burden of proof, however, remains with complaint counsel under the doctrine of *Automatic Canteen*. This is not unlike the situation in Count I where A&P is forbidden to engage in misrepresentations but the burden of proving the misrepresentations still rests upon complaint counsel. A&P's objection to the proposed order with respect to Count II, therefore, is reasonable only to the extent that it suggests shifting the burden of proof to A&P. The order herein corrects that error.

A&P also objects to the proposed order arguing that other statutory defenses available to it are excluded by the language of the order since it does not mention such defenses as lack of knowledge of the discrimination or lack of injury to competition. This argument was also raised in the *Ruberoid* case, *supra*;

[The absence of such provisos] cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos.

In that case the order simply prohibited Ruberoid from discriminating in price by selling its products to any pur-

*Initial Decision*

chaser at prices lower than those granted other purchasers who compete with the favored purchaser in the resale of the products. The court found it unnecessary to specify the statutory defenses. Here, too, unmentioned statutory defenses available to A&P have not been negated nor lost to A&P by reason of their omission.

**[89]****ORDER**

IT IS ORDERED that respondent, The Great Atlantic & Pacific Tea Company, Inc., a corporation, and its officers, representatives, agents and employees, directly or through the use of any corporate or other device in or in connection with the offering to purchase or purchase of fluid milk and other dairy products in commerce as "commerce" is defined in the amended Clayton Act, for resale in outlets operated by the respondent, do forthwith cease and desist from:

(a) misleading any supplier of fluid milk or other dairy product by misrepresenting a material fact which could reasonably be expected to affect the suppliers' price to A&P; and

(b) directly or indirectly inducing, receiving or accepting from any seller a net price it knows or should know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers where A&P is competing with the purchaser paying the higher price, unless A&P knew or had reason to believe that the price difference in its favor made only due allowance for cost differences resulting from differing methods or quantities in which such products are sold **[90]** or delivered to such purchasers or said price was granted to it by the supplier to meet a lawful equally low price of a competitor. For the purpose of determining the "net price" under the terms of this order there shall be taken



*Initial Decision*

into account all discounts or other terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that A&P shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED that A&P shall notify the Commission at least thirty days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect its compliance obligations arising out of the order.

IT IS FURTHER ORDERED that A&P shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied and will comply with this order.

IT IS FURTHER ORDERED that Count III of this complaint be, and the same hereby is, dismissed.

/s/ HARRY R. HINKES  
Harry R. Hinkes  
Administrative Law Judge

September 24, 1975

PRICES PAID FOR MILK BY A&P COMPARED TO LOWEST  
PRICE AVAILABLE TO ITS COMPETITORS IN THE  
"CHICAGO & SUBURBS AREA" 11/65-12/68

HOMO—HALF-GALLONS—PAPER

Date	Non-A&P Stores		A&P Stores		
	Borden List Price <sup>1</sup>	Minimum Price	Maximum Discount From List Price <sup>2</sup>	Private Label Price <sup>3</sup>	Discount From List Price
11/65—	\$0.49	\$0.3479	29.0%	\$0.3124	36.2%
1/66					11.4%
1/66—	.49	.3430	30.0%	.3124	36.2%
2/66					9.8%
2/66—	.51	.357	30.0%	.3254	36.2%
5/66					9.7%
5/66—	.52	.364	30.0%	.3254	37.4%
8/66					11.9%
8/66—	.54	.378	30.0%	.3376	37.5%
9/66					12.0%
9/66—	.56	.392	30.0%	.3514	37.3%
10/66					11.6%
10/66—	.56	.392	30.0%	.3534	36.9%
11/66					10.9%

<sup>1</sup> Source: CX 137, 139-150.

<sup>2</sup> Sources: CX 120, 138; Gose Tr. 1110.

<sup>3</sup> Source: CX 255B.

<sup>4</sup> Calculated by dividing the difference between the minimum price paid by others and the private label price by the private label price paid by A & P.

*Initial Decision*

Date	Non-A&P Stores		A&P Stores		
	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price
11/66- 3/67	\$0.56	\$0.392	30.0%	\$0.3514	37.3%
3/67- 4/67	.55	.385	30.0%	.3376	38.6%
4/67- 5/67	.55	.385	30.0%	.3416	37.9%
5/67	.57	.399	30.0%	.3502	38.6%
5/67- 9/67	.57	.399	30.0%	.3534	38.0%
9/67- 5/68	.59	.413	30.0%	.3664	37.9%
5/68- 7/68	.61	.427	30.0%	.3762	38.3%
7/68- 12/68	.62	.434	30.0%	.3828	38.3%
					13.4%

Percent  
Overcharge  
11.6%

14.0%

12.7%

13.9%

12.9%

12.7%

13.5%

13.4%

## HOMO—GALLONS—PAPER

Date	Non-A&P Stores			A&P Stores		
	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65— 1/66	\$0.98	\$0.6958	29.0%	\$0.6248	36.2%	11.4%
1/66— 2/66	.98	.686	30.0%	.6248	36.2%	9.8%
2/66— 5/66	1.02	.714	30.0%	.6508	36.2%	9.7%
5/66— 8/66	1.04	.728	30.0%	.6508	37.4%	11.9%
8/66— 9/66	1.08	.756	30.0%	.6752	37.5%	12.0%
9/66— 10/66	1.12	.784	30.0%	.7028	37.3%	11.6%

1186a

*Initial Decision*

Date	Non-A&P Stores		A&P Stores		Percent Overcharge
	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price
10/66-	\$1.12	\$0.784	30.0%	\$0.7068	36.9%
11/66					10.9%
11/66-	1.12	.784	30.0%	.7028	37.3%
3/67					11.6%
3/67-	1.10	.770	30.0%	.6752	38.6%
4/67					14.0%
4/67-	1.10	.770	30.0%	.6832	37.9%
5/67					12.7%
5/67	1.14	.798	30.0%	.7004	38.6%
					13.9%
5/67-	1.14	.798	30.0%	.7068	38.0%
9/67					12.9%
9/67-	1.18	.826	30.0%	.7328	37.9%
5/68					12.7%
5/68-	1.22	.854	30.0%	.7524	38.3%
7/68					13.5%
7/68-	1.24	.868	30.0%	.7656	38.3%
12/68					13.4%

## HOMO—QUARTS—PAPER

1187a

*Initial Decision*

Date	Non-A&P Stores		A&P Stores		
	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price
11/65— 1/66	\$0.265	\$0.1882	29.0%	\$0.1712	35.4%
1/66— 2/66	.265	.1855	30.0%	.1712	35.4%
2/66— 5/66	.275	.1925	30.0%	.1777	35.4%
5/66— 8/66	.28	.1960	30.0%	.1777	36.5%
8/66— 9/66	.29	.2030	30.0%	.1838	36.6%
9/66— 10/66	.30	.2100	30.0%	.1907	36.4%
10/66— 11/66	.30	.2100	30.0%	.1917	36.1%
11/66— 3/67	.30	.2100	30.0%	.1907	36.4%
3/67— 4/67	.295	.2065	30.0%	.1838	37.7%
4/67— 5/67	.295	.2065	30.0%	.1858	37.0%
5/67	.305	.2135	30.0%	.1901	37.7%
					12.3%

Percent  
Overcharge

9.9%

8.4%

8.3%

10.3%

10.5%

10.1%

9.6%

10.1%

12.4%

11.1%

12.3%



*Initial Decision*

## Appendix

[vi]

Date	Non-A&P Stores		A&P Stores		Percent Overcharge
	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price
5/67-9/67	\$0.305	\$0.2135	30.0%	\$0.1917	37.2%
9/67-4/68	.315	.2205	30.0%	.1982	37.1%
4/68-7/68	.325	.2275	30.0%	.2031	37.5%
7/68-12/68	.33	.2310	30.0%	.2064	37.5%
					11.4%
					11.3%
					12.0%
					11.9%

## Initial Decision

## Appendix

## 2% MILK—½ GALLON—PAPER

Date	Non-A&P Stores		A&P Stores		Percent Overcharge
	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price
11/65-	\$0.46	\$0.3266	29.0%	\$0.2914	36.7%
1/66					12.1%
1/66-	.46	.3220	30.0%	.2914	36.7%
2/66					10.5%
2/66-	.48	.3360	30.0%	.3044	36.6%
5/66					10.4%
5/66-	.49	.3430	30.0%	.3044	37.9%
8/66					12.7%
8/66-	.51	.3570	30.0%	.3166	37.9%
9/66					12.8%
9/66-	.53	.3710	30.0%	.3304	37.7%
10/66					12.3%
10/66-	.53	.3710	30.0%	.3324	37.3%
11/66					11.6%
11/66-	.53	.3710	30.0%	.3304	37.7%
3/67					12.3%
3/67-	.52	.3640	30.0%	.3166	39.1%
4/67					15.0%
4/67-	.52	.3640	30.0%	.3206	38.4%
5/67					13.5%
5/67-	.54	.3780	30.0%	.3292	39.0%
5/67					14.8%

*Initial Decision*

Date	Non-A&P Stores		A&P Stores		Percent Overcharge
	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price
5/67-9/67	\$0.54	\$0.3780	30.0%	\$0.3324	38.4%
9/67-5/68	.56	.3920	30.0%	.3454	38.3%
5/68-7/68	.58	.4060	30.0%	.3552	38.8%
7/68-12/68	.59	.4130	30.0%	.3618	38.7%

SKIM MILK— $\frac{1}{2}$  GALLON—PAPER

1191a

*Initial Decision*

Date	Non-A&P Stores			A&P Stores		
	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price	Percent Overcharge
11/65-	\$0.46	\$0.3266	29.0%	\$0.2834	38.4%	15.2%
1/66						
1/66-	.46	.3220	30.0%	.2834	38.4%	13.6%
2/66						
2/66-	.48	.3360	30.0%	.2964	38.2%	13.4%
5/66						
5/66-	.49	.3430	30.0%	.2964	39.5%	15.7%
8/66						
8/66-	.51	.3570	30.0%	.3086	39.5%	15.7%
9/66						
9/66-	.53	.3710	30.0%	.3224	39.2%	15.1%
10/66						
10/66-	.53	.3710	30.0%	.3244	38.8%	14.4%
11/66						
11/66-	.53	.3710	30.0%	.3224	39.2%	15.1%
3/67						
3/67-	.52	.3640	30.0%	.3086	40.7%	18.0%
4/67						
4/67-	.52	.3640	30.0%	.3126	39.9%	16.4%
5/67						
5/67	.54	.3780	30.0%	.3212	40.5%	17.7%

1192a

*Initial Decision*

Date	Non-A&P Stores		A&P Stores		Percent Overcharge
	Borden List Price	Minimum Price	Maximum Discount From List Price	Private Label Price	Discount From List Price
5/67-	\$0.54	\$0.3780	30.0%	\$0.3244	39.9%
9/67					16.5%
9/67-	.56	.3920	30.0%	.3374	39.8%
3/68					16.2%
3/68	.56	.3920	30.0%	.3000	46.4%
3/68-	.56	.3920	30.0%	.3374	39.8%
5/68					30.7%
5/68-	.58	.4060	30.0%	.3472	39.8%
7/68					46.4%
7/68-	.59	.4130	30.0%	.3538	40.1%
12/68					40.0%
					16.9%
					16.7%

**Final Order**

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Calvin J. Collier, Chairman  
Paul Rand Dixon  
Elizabeth Hanford Dole  
Stephen Nye

Docket No. 8866

---

In the Matter of  
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,  
a corporation, and  
BORDEN, INC., a corporation.

---

**FINAL ORDER**

This matter having been heard by the Commission upon the appeal of The Great Atlantic & Pacific Tea Company, Inc. (hereinafter "A&P") from that portion of the initial decision dealing with Counts I and II, and upon the appeal of complaint counsel from that portion of the initial decision concerning Count III; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission for reasons stated in the accompanying opinion, having granted the appeal of A&P concerning Count I but otherwise denying the appeals of A&P and complaint counsel; accordingly

IT IS ORDERED that, except to the extent that it is inconsistent with the Commission's opinion, the initial decision



*Final Order*

of the Administrative Law Judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter; and

IT IS FURTHER ORDERED that the following order be, and it hereby is, entered:

## ORDER

IT IS ORDERED that A&P, a corporation, and its officers, representatives, agents, and employees, directly or through the use of any other device in connection with the offering to purchase or purchase of milk and other dairy products in commerce, as "commerce" is defined in the Robinson-Patman Act, for resale in outlets operated by A&P, do forthwith cease and desist from directly or indirectly inducing, receiving, or accepting from any seller a net price that A&P knows or has reason to know is below the net price at which said products of like grade and quality are being sold by such seller to other purchasers with whom A&P is competing—provided, however, that this prohibition shall not apply if A&P did not know and had no reason to know that the price difference in its favor did not make due allowance for cost differences resulting from differing methods or quantities in which such products are sold or delivered to such purchasers, or if A&P can show that said price was granted to it by the supplier to meet a competitor's equally low price, which price A&P reasonably believed to be lawful. For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts and other terms and conditions of sale.

IT IS FURTHER ORDERED that A&P shall forthwith distribute a copy of this order to its operating divisions and to its suppliers of milk and other dairy products.

1195a

*Final Order*

IT IS FURTHER ORDERED that A&P notify the Commission at least thirty days prior to any proposed change in A&P's structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation, which may affect compliance obligations arising under this order.


IT IS FURTHER ORDERED that A&P shall, within sixty (60) days after the effective date of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

By the Commission. Not having participated in the oral argument in this matter, Chairman Collier did not participate in the resolution of it.

/s/ CHARLES A. TOBIN  
Charles A. Tobin,  
Secretary.

S E A L

ISSUED: April 29, 1976



**Opinion of the Commission**

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**

Calvin J. Collier, Chairman  
Paul Rand Dixon  
Elizabeth Hanford Dole  
Stephen Nye

Docket No. 8866

---

**In the Matter of**

**THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,  
a corporation, and  
BORDEN, INC., a corporation.**

---

**OPINION OF THE COMMISSION**

**By NYE, Commissioner:**

The complaint in this matter was issued on October 8, 1971.<sup>1</sup> Count I of the complaint charged that The Great Atlantic & Pacific Tea Company, Inc. (hereinafter "A&P")

---

<sup>1</sup> For convenience, the following abbreviations are used in this opinion:

I.D.—Initial decision of administrative law judge  
(Cited by paragraph number).

Tr.—Transcript of testimony (Cited by page number).

CX—Commission exhibit.

RX—Respondent A&P exhibit.

Citations to "Appeal," "Answer," and "Reply" refer to the briefs filed in reference to Counts I and II. Citation to "C.C. Appeal" refers to complaint counsel's appeal brief filed in reference to Count III.

*Opinion of Commission*

violated Section 5 of the Federal Trade Commission Act (hereinafter the "FTC Act"; 15 U.S.C. §45) as well as the policy of Section 2 of the amended Clayton Act (hereinafter the "Robinson-Patman Act"; 15 U.S.C. §13) by misleading Borden, Inc. (hereinafter "Borden") during negotiations concerning the sale by Borden of milk and other dairy products to A&P. The gravamen of the charge is that A&P failed to inform Borden that Borden's offer, purportedly made to meet a competitive bid received by A&P from another potential supplier, was, in fact, substantially lower than that other bid. Count II charged that A&P violated Section 2(f) of the Robinson-Patman Act (15 U.S.C. §13(f)) by knowingly inducing or receiving discriminations in price from Borden, which discriminations are prohibited by Section 2(a) of that Act. Finally, Count III charged that both A&P and Borden violated Section 5 of the FTC Act by combining to stabilize and to maintain the retail and wholesale prices of milk and other dairy products.

Hearings were held before Administrative Law Judge Harry R. Hinkes, and an initial decision was rendered on September 24, 1975. Judge Hinkes found that A&P had violated the law as charged in Counts I and II but dismissed Count III. Judgment was entered accordingly.

A&P has appealed from the decision, asserting that it did not violate the law as charged in Counts I and II. Complaint counsel has appealed from the decision, arguing that A&P and Borden violated the law as charged in Count III. The Commission heard oral arguments on these appeals on February 25, 1976.

The decision of Judge Hinkes is affirmed as to Counts II and III but reversed as to Count I. Except as qualified or altered by this opinion, we adopt his findings and conclusions. We have substituted a new order.

*Opinion of Commission**I. Factual Background*

Although the record in this case is voluminous, exceeding 20,000 pages, the facts are generally not disputed. All of the violations alleged in this action concern the events surrounding a November 1, 1965 agreement between A&P and Borden under which Borden began supplying private label milk and other dairy products to more than 200 A&P stores in an area that included portions of Illinois and Indiana.

From the record, it appears that in November of 1964, Herschel Smith, A&P's Headquarters Dairy Buyer in New York, advised A&P's Divisional Purchasing Directors of the savings that could be realized by switching from advertised brand to private label milk (Tr. 1350-1351, 1862-1863). Soon thereafter, A&P asked Borden to submit an offer to supply, under private label, certain of A&P's milk and other dairy product requirements in the Chicago area, where Borden had served A&P since the late 1950's. From then until August 13, 1965, A&P and Borden engaged in extensive negotiations which culminated in Borden's offer to grant A&P a discount for switching to private label, provided that A&P would accept limited delivery service (CX 36, 37). Borden claimed that this proposal would reduce A&P's costs by \$410,000 per annum compared to what A&P had been paying (CX 37; Tr. 869-871). A&P decided that it was not satisfied and solicited offers from other dairies (Tr. 871; see Tr. 1361-1362).

Thereafter, on August 31, 1965, A&P received an offer from Bowman Dairy (CX 50) that was lower than Borden's August 13 offer (see CX 65A; A&P's Proposed Findings at 121-122).<sup>2</sup> On or about September 1, 1965, Elmer Schmidt, A&P's Chicago unit buyer, telephoned Gordon Tarr, Borden's Chicago chain store sales manager, and stated, "I have

---

<sup>2</sup> Contrary to Judge Hinkes' conclusion (I.D. 103, 106-07, 114), we find that the Bowman bid was operative and could be compared to the Borden offer.

*Opinion of Commission*

a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park." (Tr. 873). Although Tarr asked Schmidt for some details, Schmidt said that he could not tell Tarr anything except that a \$50,000 improvement in Borden's bid "would not be a drop in the pocket." (Tr. 874-875; *see* CX 53A-B). Contrary to its usual practice, A&P then offered Borden the opportunity to submit another bid (Tr. 1248-1249, 1892-1893).

In consequence, Borden offered to submit a new bid which doubled the savings to A&P from \$410,000 to \$820,000 (Tr. 227-228). In presenting the offer, Borden emphasized to A&P that Borden needed to keep A&P's business and was making the new offer solely to meet the described competitive bid (Tr. 228). Of course, as noted, Borden knew very little about the competitive bid that it was purporting to meet. Later, Borden submitted a detailed offer (CX 56), which it slightly revised to meet some of A&P's specific demands (CX 62).<sup>3</sup> A&P concluded at the time that Borden's offer was "substantially better" in price<sup>4</sup> than Bowman's (Tr. 1413-1414, 1896-1997; CX 263), and therefore, in October of 1965, A&P accepted it (Tr. 1413; CX 71). The offer was, in fact, much better in price than Bowman's (*see* CX 263B; compare CX 75F-J with CX 50).

A&P's Schmidt requested a letter from Borden which would state that the prices Borden had quoted were proportionately available to competitors of A&P (Tr. 1783, 1786). Borden supplied a letter stating simply that the

---

<sup>3</sup> After submission of the bid, Borden excluded glass gallons because A&P stated that "it is not fair to the other bidders." (Tr. 884). In fact, however, the Bowman bid had included a quote on glass gallons (CX 50). A&P also told Borden to "sharpen your pencil a little bit because you are not quite there" meaning, according to Borden's Tarr, that Borden had not yet met the competitive bid (Tr. 885).

<sup>4</sup> A&P was only interested in obtaining the lowest price possible (CX 25B, 263B; Tr. 1400-1401, 1728-1729).



*Opinion of Commission*

prices were legal and that Borden would defend them (RX 2). In fact, officials of Borden thought that the other bids were based on "anyhow accounting"—including only out-of-pocket or direct costs—and informed A&P of their belief (CX 63; see Tr. 213-214, 872-873, 955).

*II. Count I: Failing to Inform*

Count I charged that A&P violated Section 5 of the FTC Act as well as the policy of Section 2 of the Robinson-Patman Act by misleading Borden during negotiations concerning the sale by Borden of milk and other dairy products to A&P. The thrust of the charge is that A&P failed to inform Borden that Borden's offer, made in an attempt to meet a competitive bid received by A&P from another potential supplier, was substantially lower than that of the only other bidder. The count is directed to the question of what must legally be disclosed during contract negotiations.

We briefly state the relevant facts. A&P compared the Bowman bid with Borden's and concluded that Borden's bid was substantially lower. Also, A&P knew that Borden was relying on the meeting competition defense (Tr. 248, 886, 1789, 1792, 1801). Finally, A&P accepted Borden's bid without telling Borden that Borden substantially "beat" Bowman's bid as it clearly had (Tr. 1413; CX 71, 263; see Answer at 42). Because A&P did not then inform Borden that the meeting competition defense was unavailable, Judge Hinkes concluded that A&P engaged in an "unfair" practice that violated Section 5 of the FTC Act (I.D. 115, 116).<sup>5</sup>

At the outset we emphasize our belief that Section 5 of the FTC Act can reach actions that violate the policy of the Robinson-Patman Act, *cf. FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972), and, further, that Section 5

---

<sup>5</sup> Although A&P made certain misrepresentations, see note 3, *supra*, such misrepresentations are not relevant to the charge.

*Opinion of Commission*

should be used to fill the gap in coverage caused by the manner in which Congress added the buyer liability provision contained in Section 2(f) of the Robinson-Patman Act.<sup>6</sup> It is well established that Section 5 can reach buyers who induce violations of the promotional allowance and payment for services provisions of the Robinson-Patman Act. *Fred Meyer, Inc. v. FTC*, 359 F.2d 351, 367 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968); *Giant Food Inc. v. FTC*, 307 F.2d 184, 186 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); *Grand Union Co. v. FTC*, 300 F.2d 92, 98-99 (2d Cir. 1962). According to the Court in *Grand Union*, the application of Section 5 to buyers who violate specific provisions of the Robinson-Patman Act neither offends Congressional policies nor circumvents the criteria of illegality prescribed by the Robinson-Patman Act. *Id.* at 58. In addition, it is appropriate to use Section 5 to fence in activities which, if permitted to mature, could violate the antitrust laws, including the Robinson-Patman Act, or which otherwise violate the policy of the antitrust laws. *Id.* at 99.

Having recognized this, however, and having measured A&P's conduct against these standards, we do not think that a violation of Section 5 has occurred here. The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest. As the Court in *Forster Mfg. Co. v. FTC*, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965), stated in describing normal practice:

---

<sup>6</sup> "Although Robinson-Patman Act prohibitions were predominantly directed at discriminatory concessions coerced by powerful buyers, the legislative process relegated Section 2(f) to a minor role . . . Section 2(f) first emerged as an amendment offered in debate on the floor of the Senate . . . and represented a last minute afterthought addition." Att'y Gen.'s Nat'l Comm. to Study the Antitrust Laws, Report 193 (1955) (hereinafter "Report").

*Opinion of Commission*

The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place.

We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution. As the Attorney General's National Committee to Study the Antitrust Laws stated, "Legalistic impediments to the normal bargaining process . . . might well deprive the public of gains that under effective competition it has a right to expect." Report, *supra* note 6, at 196. We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid. We do not believe that the failure of buyers to engage in such disclosure should violate the FTC Act.<sup>7</sup> Therefore, Count I should be dismissed.

---

<sup>7</sup> We are not concluding that nondisclosure during commercial bargaining never rises to a Section 5 offense. We simply hold that it should not be A&P's responsibility to tell Borden whether a legal defense is available. As discussed at p. 20 n. 19, a seller's good faith meeting competition defense under the Robinson-Patman Act is dependent on some factors that are more readily available to him than to the buyer. For example, to have a meeting competition defense, the seller who has knowingly discriminated in price must show that he acted prudently in surmising whether his bid, in fact, met the equally low price of a competitor. *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945); *Viviano Macaroni Co. v. FTC*, 411 F.2d 255, 257-58 (3d Cir. 1969).

*Opinion of Commission*III. *Count II: Knowingly Inducing or Receiving Discriminations in Price*

Count II charged that A&P violated Section 2(f) of the Robinson-Patman Act by knowingly inducing or receiving discriminations in the price of milk and other dairy products from Borden, which discriminations are prohibited by Section 2(a) of that Act.<sup>8</sup>

Section 2(f) was enacted to make the prohibitions of price discrimination applicable to buyers. *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 70 (1953). In order to prove a violation of Section 2(f), complaint counsel must not only establish all elements of a Section 2(a) violation, but must also meet special requirements with respect to showing the respondent's "knowledge." Further, the buyer is entitled to raise any defenses that the seller might have raised, specifically those listed in Sections 2(a) and 2(b).<sup>9</sup>

---

<sup>8</sup> Section 2(f) reads:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 2(a) reads in pertinent part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .

<sup>9</sup> Section 2(b) reads in pertinent part:

. . . nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . . .

*Opinion of Commission*

A&P admits that the A&P-Borden transaction contained many of the elements of a Section 2(a) offense. It argues, however, that the sales in Illinois were not "in commerce" and that A&P did not receive a discriminatory price that caused competitive injury. In addition, A&P asserts that complaint counsel failed to establish (1) that the price quoted by Borden was not made to meet a competitive bid and was not cost justified and (2) that A&P knew that the price received was not covered by one of those defenses.

We find that A&P has violated Section 2(f) and reject its proffered arguments.

a. *In Commerce*

The Robinson-Patman Act forbids discriminatory pricing arrangements only "where either or any of the purchases involved in such discrimination are in commerce." 15 U.S.C. § 13(a). Therefore to conclude that jurisdiction exists to prosecute A&P, either A&P's or its competitors' purchases must be "in commerce." Recently, the Supreme Court has reiterated its position that at least one of the two transactions which result in the discrimination must cross a state line. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-201 (1974). Although A&P does not dispute the finding that the sales to stores in Indiana are "in commerce" for Robinson-Patman Act purposes, A&P argues that the "in commerce" requirement is not met for the Illinois sales.

We reject A&P's claim. In *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), the respondent dairy claimed that none of its sales were made in interstate commerce although 20% of its raw milk came from out-of-state. The dairy sold fluid milk processed in its Albuquerque, New Mexico plant to stores in Albuquerque. In holding that the "in commerce" requirement was met, the Court stated:

*Opinion of Commission*

[T]he milk passed in a steady flow from the farms in Colorado through the Santa Fe processing plant, where it underwent a rather negligible processing operation, which did not change its character appreciably, to the shelves of retail grocery establishments in Albuquerque . . . [U]nder the stream of commerce doctrine, milk produced in one state and processed and distributed in another state does not lose its interstate character because of standardization, and pasteurization. *Id.* at 677.

Other courts concur with the reasoning and results in *Foremost Dairies*. *E.g.*, *Dean Milk Co. v. FTC*, 395 F.2d 696, 714-715 (7th Cir. 1968) (25% of raw milk came from out-of-state).

Most of the raw milk used by Borden's Woodstock, Illinois dairy—approximately 60%—came from Wisconsin (Borden Admission at 8, Sept. 29, 1972). This dairy supplied substantially all of the private label milk sold to A&P (Borden Response at 5, May 3, 1972; A&P Admission at 7, Sept. 27, 1972). Finally, the processing in Woodstock did not interrupt the flow of milk from the farm to A&P's stores (I.D. 17, 168; *see* Borden Additional Admission at 13-14, March 15, 1973; Tr. 107-109). Therefore, the *Foremost Dairies* test is met.

In addition, the negotiations leading up to the agreement between A&P and Borden were multi-state in nature (Tr. 1711) and therefore "in commerce" (I.D. 167). *See Beatrice Foods Co.*, 76 F.T.C. 719, 747 (1969). A&P's Schmidt testified that A&P would not accept an offer to supply only a portion of its stores in Illinois and Indiana (Tr. 1711; *see* Tr. 6126-27).

b. *Discrimination in price and competitive injury*

The Robinson-Patman Act requires both that a discrimination in price take place and that the possible effect of



*Opinion of Commission*

such discrimination be substantially to lessen competition or to injure, destroy, or prevent competition with a primary or secondary line competitor or with a direct or indirect customer of the buyer.<sup>10</sup> In addition, to conclude that a Section 2(f) violation has taken place, it must be found that the buyer knowingly received the illegal price discrimination. *Automatic Canteen Co. v. FTC*, *supra*, 346 U.S. at 71. A&P argues that the evidence fails to demonstrate that it was a beneficiary of a price discrimination or that competition was injured. A&P criticizes the price comparisons of complaint counsel, the representativeness of the competitors who were allegedly injured, and the establishment of substantial injury. In addition, A&P states that it did not know that it was a beneficiary of an illegal price discrimination.

We agree with Judge Hinkes' findings (I.D. 62-88; 118-123) that the relevant comparisons demonstrate the existence of discriminations in price. We note that a price comparison does not have to include the full line of dairy products nor A&P's purchases of Borden brand products. We faced and dismissed this same argument in *Beatrice Foods Co.*, 76 F.T.C. 719, 806 (1969), *aff'd sub nom.*, *Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). Specifically, the price of private label milk and other dairy products sold to A&P may validly be compared with Borden's sales of such items to other groceries to ascertain whether discrimination took place. The *Kroger* Court stressed "the competitive advantage which results when disadvantaged competitors are denied a [private] label which the favored buyer receives." 438 F.2d at 1379. In addition, although there were differences in the way A&P and its competitors were served, the distinctions were

---

<sup>10</sup> Although one could conceivably argue that injury at the primary or seller level took place, complaint counsel limited their case to proving secondary or buyer level discrimination.

*Opinion of Commission*

often minimal and, in any event, are more properly considered in connection with the cost justification defense.

We are unclear as to what A&P means when it argues that the sample of stores must be "representative." As the Court in *Kroger Co. v. FTC*, *id.* at 1378, stated, "[E]vidence of discrimination in only one area is sufficient to meet the requirements of the Act." *Accord*, *Foremost Dairies, Inc. v. FTC*, *supra*, 348 F.2d at 681. "[U]nless minuscule, the portion of the market that might be affected by the charging of these discriminatory prices is immaterial." *National Dairy Products Corp. v. FTC*, 395 F.2d 517, 522-23 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968). The area studies<sup>11</sup> presented by complaint counsel are quite detailed and are, in fact, representative of the areas allegedly affected (*See, e.g.*, CX 182; RX 234 at 19). If anything, complaint counsel has exceeded any requirement of "representativeness" (*See* I.D. 121).

In addition, complaint counsel has shown that competitive injury occurred, regardless of whether we applied the reasonably "possible" test, *e.g.*, *FTC v. Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Purolator Products, Inc. v. FTC*, 352 F.2d 874, 881 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968), or the "probable" test, *Foremost Dairies, Inc. v. FTC*, *supra*, 348 F.2d at 680.<sup>12</sup> The Robinson-Patman Act does not require proof that injury actually occurred but merely a showing that competition *may* be reduced because discrimination took place. *National Dairy Products Corp. v. FTC*, *supra*, 395 F.2d at 521. "The statute is designed to reach such discriminations 'in their incipency' before the harm to competition is effected." *FTC v. Morton Salt Co.*, *supra*, 334 U.S. at 46 n. 14.

<sup>11</sup> These include Chicago and its suburbs, Gary-Hammond, and Valparaiso, Indiana.

<sup>12</sup> As the court in *Foremost Dairies* noted, 348 F.2d at 680 n. 11, "[T]he distinction between the two standards may be more apparent than real."

*Opinion of Commission*

We note that many courts have discussed the significance of differences in the prices charged to competing businesses in industries such as retail food, which are characterized by keen competition and low profit margins. *E.g.*, *Kroger Co. v. FTC*, *supra*, 438 F.2d at 1379; *Fred Meyer, Inc. v. FTC*, *supra*, 359 F.2d at 367; *see United Biscuit Co. of America v. FTC*, 350 F.2d 615, 621-22 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966). Milk is one of the most important commodities carried in retail grocery stores (A&P Admission at 3, March 1, 1973). Therefore, discrimination in favor of A&P amounting to as much as 22.5% (Model Food Center, CX 182, 187, 191A)<sup>13</sup> in this extremely competitive, price sensitive industry compel an inference of adverse competitive effect. *See, e.g.*, *FTC v. Morton Salt Co.*, *supra*, 334 U.S. at 46-47; *Kroger Co. v. FTC*, *supra*, 438 F.2d at 1379.<sup>14</sup> That A&P did not pass the discount on as a lower price to consumers does not rebut the inference *Foremost Dairies Inc. v. FTC*, *supra*, 348 F.2d at 680. For example, in receiving the price discount, A&P enlarged its profit margin (*See* CX 185, 255; Tr. 2059-2060)<sup>15</sup> and thereby obtained a material capital advantage in this highly competitive field. *See Kroger Co. v. FTC*, *supra*, 438 F.2d at 1378; *Foremost Dairies, Inc. v. FTC*, *supra*, 348 F.2d at 680.

<sup>13</sup> The *Kroger* Court, 438 F.2d at 1379 n. 4, listed examples of discounts in secondary line cases. The discounts to A&P are in line with those found to cause injury in other cases. For example, the Court in *Foremost Dairies, Inc. v. FTC*, *supra*, 348 F.2d at 675, found competitive injury where discounts were as low as 5%.

<sup>14</sup> The Court in *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248, 1252 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), a private Robinson-Patman Act action, stated that a price differential alone establishes competitive injury. There is no need to prove a lessening of competition to obtain damages.

<sup>15</sup> The profit margins of the unfavored competitors were very low, ranging from less than 1% to 5% (*See* Appendix 4 [in camera]; CX 184, 189, 192, 199A, 199J-Z, 201, 203 [all in camera]; I.D. 88).

*Opinion of Commission*

Finally, we address the issue of knowledge. A&P admitted that milk is one of the most important commodities in groceries and that milk is a staple purchased more frequently by consumers than other products (A&P Admission at 3, March 1, 1973). It is acknowledged that selling milk at a higher price than one's competitors will cause some consumers to switch stores. A&P also admitted that profit margins in the retail grocery business are very low (A&P Admission at 4, March 1, 1973). Therefore, A&P by virtue of its trade experience or simply common sense, knew or should have known that it was a beneficiary of a price discrimination having the requisite harmful competitive effects (*see* I.D. 86-88, 97). Accordingly, we reject A&P's arguments.

*c. Meeting Competition*

A seller who has discriminated in price is guiltless under the Robinson-Patman Act if the lower price was offered in good faith to meet an equally low price of a competitor. 15 U.S.C. § 13(b). The Supreme Court has stated that the buyer is not liable under Section 2(f) if the lower price he induces is within the meeting competition defense or if the buyer is unaware that the price cannot be protected by that defense. *Automatic Canteen Co. v. FTC*, *supra*, 346 U.S. at 74. The Court in *Kroger Co. v. FTC*, *supra*, 438 F.2d at 1377, noted that when a buyer is charged with violating Section 2(f), the price he induces must come within the meeting competition defense not only from the seller's point of view but also from the buyer's. This is consistent with the Supreme Court's statement concerning the burden of going forward in a Section 2(f) case:

Our view that § 2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the

*Opinion of Commission*

seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available to a buyer more readily even than to a seller. *Automatic Canteen v. FTC*, *supra*, 346 U.S. at 79 n. 23.

Specifically, proof that the seller did not act in good faith is unnecessary to a finding that a buyer cannot assert the meeting competition defense.

In its reply brief, A&P argues that its contemporaneous comparison of the Bowman and the last Borden bid is not relevant (Reply at 35). We disagree. The comparisons demonstrate whether A&P acted in good faith. For example, if the Borden bid "*beat*" the Bowman bid yet A&P contemporaneously reasonably believed that it only *met* the bid, we believe A&P (as well as Borden, if Borden prudently reached the same conclusion) could assert the meeting competition defense. See *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945).<sup>16</sup> However, we conclude that A&P contemporaneously concluded that Borden's bid was "substantially better" than Bowman's (Tr. 1413-1414, 1896-1897; CX 263), and A&P, therefore, cannot assert the seller's meeting competition defense.

We assume, *arguendo*, that A&P can assert the defense if the Borden bid did, in fact, happen only to meet the Bowman bid. However, while we believe that the Bowman bid was comparable and operative,<sup>17</sup> we conclude that the Borden bid was substantially better than the Bowman bid. Specifically, we find that prior to adjusting the Bowman bid to make it reflect such items as A&P's true volume requirements and delivery requirements, Borden's bid substantially beat Bowman's (See CX 263B; Compare CX 75

<sup>16</sup> A&P argued that in this case, it contemporaneously believed that Borden's bid beat Bowman's but after "properly" comparing the bids, Bowman's bid, in fact, beat Borden's (Appeal at 31-33).

<sup>17</sup> Specifically, we reverse Judge Hinkes' conclusion to the contrary (See FF 103, 106-07, 114).

*Opinion of Commission*

F-J with CX 50). In addition, after adjusting the Bowman bid to make it responsive to A&P's true situation, Borden's bid beats Bowman's by an even greater amount. Bowman would not be able to give A&P such a low price because A&P's volume was less than the \$1 million per month stipulated in the Bowman offer (*See citations in I.D. 106*) and because Bowman would have to increase the days of delivery in the Gary-Hammond area (*See citations in I.D. 107*).<sup>18</sup>

Finally, A&P argues that because Borden has not been found in violation of Section 2(a), A&P cannot be charged under Section 2(f). In other words, A&P asserts that Borden must be convicted of a Section 2(a) violation prior to or at the same time as A&P is found in violation of Section 2(f). In developing this argument, A&P claims that complaint counsel's case against A&P is premised on Borden's having a valid meeting competition defense, and that therefore, Borden would be absolved from any Section 2(a) charge. We reject the argument.

The Commission alone establishes the enforcement policy which will best accomplish the ends contemplated by Congress. *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958); *see Jewel Companies, Inc. v. FTC*, 432 F.2d 1155, 1160 (7th Cir. 1970). In deciding to issue a complaint against A&P charging a violation of Section 2(f), the Commission concluded that A&P's conduct was egregious enough to warrant such action. It did not follow that the Commission condones Borden's behavior. In addition, as complaint counsel notes (Answer at 50), A&P was the "principal malefactor" in the negotiations with Borden.

<sup>18</sup> The difference in stipulated butterfat content would not greatly change the difference in prices. Contrary to A&P's study, Borden's butterfat level was probably about 3.45% (Tr. 5513), and the Bowman bid may not have called for 3.5% (Tr. 5450-5453, 5461, 6187-6188; *see I.D. 129*).



*Opinion of Commission*

It placed the pressure on Borden, not *vice versa*. Although the Commission decided not to issue a complaint against Borden for violation of Section 2(a), the Commission has not concluded that Borden would have a valid meeting competition defense to such a charge.<sup>19</sup>

Furthermore, even though a seller has a defense to a Robinson-Patman Act charge, a buyer can still violate Section 2(f). The court in *Kroger Co. v. FTC*, *supra*, found that the buyer lied to the seller about the details of a competing bid, 438 F.2d at 1375-1376, and that the seller had no way of knowing that the buyer had lied. Therefore, in submitting the second bid, the seller had a meeting competition defense within the meaning of Section 2(b). However, this defense did not exonerate the buyer who knew that the bid was, in fact, not within the defense. "To hold otherwise . . . would put a premium on the buyer's artifice and cunning in inducing discriminatory prices [and] would violate the purposes of the Act, and frustrate the intent of the Congress." *Id.* at 1377.

---

<sup>19</sup> Judge Hinkes did not reach the question of whether Borden had a meeting competition defense (*See* I.D. 166). We believe that it is very probable that Borden did *not* have such a defense. To have a meeting competition defense, the record must demonstrate the existence of facts which would lead a reasonable and prudent person to conclude that the lower price would, in fact, meet the competitor's price. *FTC v. A. E. Staley Mfg. Co.*, *supra*, 324 U.S. at 759-760; *Hampton v. Graff Vending Co.*, 478 F.2d 527, 534 (5th Cir. 1973). As noted Borden had serious doubts concerning whether the competing bid was legal. Specifically, it believed that the other bid only considered direct costs (Tr. 237-239, 376-77, 878, 961-62). It should have asked A&P for more information about the competing bid. By not making the request, it was not acting prudently. *See Standard Oil Co. v. Brown*, 238 F.2d 54, 58 (5th Cir. 1956); F. Rowe, Price Discrimination under the Robinson-Patman Act 226 (1962). As the record clearly indicates, A&P had knowledge of Borden's belief that other dairies might submit bids that did not include all costs (Tr. 213-214, 872-873, 955).

*Opinion of Commission**d. Cost Justification*

A seller who charges different prices is exonerated if the differences are justified by a savings in cost. 15 U.S.C. § 13(a). As in the case of meeting competition, a buyer is not liable under Section 2(f) if the lower price he induces is within the cost justification defense or if the buyer is unaware that the price is not protected by that defense.

The parties and Judge Hinkes disagree as to who has the burden of proof in demonstrating whether the cost justification defense is available (I.D. 134; Answer at 66-68; Reply at 48-49). A&P and Judge Hinkes are mistaken in concluding that the *Automatic Canteen* case dealt with the burden of proof issue. Rather, the Supreme Court stated twice that it was deciding only who had the burden of first coming forward with probative evidence. 346 U.S. at 65, 82. In promulgating its rule of "fairness and convenience," *id.* at 78, the Court determined that the Commission did not satisfy this burden by showing only that the buyer had knowledge of a price differential.<sup>20</sup> Rather, the Commission must present evidence to demonstrate that the buyer was reasonably aware that the price differential could not be cost justified. *Id.* at 78-80.

The Court believed, however, that the burden of showing this knowledge "should not be difficult." *Id.* at 79. As an example of the evidence which would satisfy this burden in a situation where methods of services and quantities delivered differ, the Court held that the Commission "must only show" that the differences could not give rise to sufficient cost savings and that the buyer, knowing that these were the only differences, should have known that the differences were not cost justified. *Id.* at 80. The

---

<sup>20</sup> In *Automatic Canteen*, the Commission only established that the buyer had obtained prices as much as one-third below its competitors.

*Opinion of Commission*

Court emphasized that it would not attempt to illustrate "what other circumstances can be shown to indicate knowledge on the buyer's part that the prices cannot be justified," *id.* at 80, concluding that the Commission should do this.<sup>21</sup> *Id.* at 80-81; *accord*, *Suburban Propane Gas Corp.*, 73 F.T.C. 1269, 1272-1274 (1968) (interlocutory order); 16D J. von Kalinowski, *Business Organizations: Antitrust Laws and Trade Regulation* §§ 36.05[2]-36.05[3] (1971).

We have described on several occasions how complaint counsel can successfully meet the burden of going forward with the evidence where a favored buyer purchases in quantities or under methods differing from those accorded to disfavored buyers:

[I]f complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden. *Beatrice Foods Co.*, *supra*, 76 F.T.C. at 820, *quoting Suburban Propane Gas Corp.*, 71 F.T.C. 1695, 1699 n. 2 (1967) (interlocutory order).

We reiterate what we said in *Suburban Propane Gas Corp.*, *supra*, 73 F.T.C. at 1273—the burden of establishing a *prima facie* case or first going forward with the evidence may be satisfied without introducing a formal cost study showing that the lower prices were not, in fact, cost justified. The Court of Appeals for the Sixth Circuit

---

<sup>21</sup> The Commission has frequently decided what circumstances demonstrate that a buyer had the requisite knowledge. *E.g.*, *Mid-South Distributors v. FTC*, 287 F.2d 512, 518-19 n. 15 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961).

*Opinion of Commission*

has affirmed our use of this rule. *Kroger Co. v. FTC*, *supra*, 438 F.2d at 1378.

Once complaint counsel has satisfied their initial burden, the buyer must demonstrate that it did not know or could not reasonably have known that the price differential was not cost justified. If it fails to prove lack of knowledge, it must show that the price differential was, in fact, cost justified. *See Automatic Canteen Co. v. FTC*, *supra*, 346 U.S. at 74. Therefore, if the buyer establishes that it neither had nor should be charged with such knowledge, the buyer does not have to submit any cost justification study. However, if the buyer cannot establish the requisite lack of knowledge, it must submit a cost study if it wishes to prevail, which study generally will be held to the same standard as are cost studies offered by sellers. In other words, it is possible for the buyer to be unable to respond adequately to complaint counsel's evidence demonstrating knowledge yet be able to demonstrate that, in fact, the price differential was cost justified. Unlike the meeting competition defense, one does not need to demonstrate good faith in proving cost justification. Therefore, it is completely permissible to receive in evidence cost studies prepared after the alleged discriminatory sale and only for purposes of litigation. Rowe, *Cost Justification of Price Differentials Under the Robinson-Patman Act*, 59 Colum. L. Rev. 584, 610 (1959).

Finally, if the buyer satisfies the burden of meeting complaint counsel's *prima facie* case, then complaint counsel must rebut the buyer's evidence. The buyer may then introduce other evidence responding to complaint counsel. Although the burden of going forward may shift back and forth during the hearing and is frequently not so easily segregated, the burden of persuasion as to the issue of whether the buyer had the requisite knowledge that the cost justification defense is unavailable rests with com-

*Opinion of Commission*

plaint counsel while the burden of persuasion as to the issue of whether the prices are, in fact, cost justified rests with the buyer. *Suburban Propane Gas Corp.*, *supra*, 73 F.T.C. at 1274-1275; see *Beatrice Foods Co.*, *supra*, 76 F.T.C. at 820.

We believe that the evidence submitted by complaint counsel in this case well exceeded its initial burden. Many competitors were charged a much higher price than A&P for Borden's milk products even though they bought in greater quantities than the individual A&P stores with which they were competing (*E.g.*, Burger's: CX 182, 187, 188A, RX 234, p. 19; Tr. 2270, 2381, 2385). Although many of these stores received more service than A&P, the service savings to Borden could not in any way justify the price differentials (*See* I.D. 109-110). In addition, even those companies that received limited service paid a higher price than A&P (*See* Complaint Counsel's Proposed Findings, Vol. 1 at 150-151), a price differential that was not justified by the saving of such costs as advertising (*See* CX 54; Tr. 3387, 3430, 6136). A&P knew about the differentials, since it was being charged the "regular" price for branded items (*See* CX 75, 255; RX 66). This evidence in itself would probably be sufficient to shift the burden of going forward. However, complaint counsel introduced much more evidence to demonstrate that A&P knew or should have known that the prices it received were not cost justified.

First, Borden stated explicitly that its final offer could *only* be justified on the basis of meeting competition, and A&P accepted the offer on this representation (Tr. 248, 886, 1789, 1792).<sup>22</sup> As the Supreme Court stated in *Auto-*

---

<sup>22</sup> When Ralph Minkler, President of Borden's Central District, presented Borden's final bid to A&P's Schmidt, he stated: "This price is given to you by us on the feeling and belief that we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis." (Tr. 248).

*Opinion of Commission*

*matic Canteen Co. v. FTC, supra*, 346 at U.S. 73: "§ 2(f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer." *Accord*, 80 Cong. Rec. 9419 (1936) (Statement of Congressman Utterback in presenting conference report to House); Report, *supra* note 6, at 193. The Borden statement put A&P on notice that it was likely that Borden did not have a cost justification defense. *Cf. Beatrice Foods Co., supra*, 76 F.T.C. at 821 (Because seller was told by two other dairies that price might not be cost justified, he had notice of possible cost justification problems).

Second, although A&P requested the customary assurances from Borden that Borden's discounts were available to others on proportionately equal terms (Tr. 1783, 1786-1788, 1978-1979), A&P did not receive them. In fact, Borden specifically refused to comply, writing instead, "our prices are proper under applicable law and we are prepared to defend these prices." (CX 263H; *see* Tr. 1406, 1428, 1438-1440).<sup>23</sup>

Third, Borden provided A&P with detailed cost data during the course of the negotiations, data which showed that Borden would be either losing money or making a minimal profit (CX 23, 24, 25A, 26; Tr. 201-205, 1866-1869). Although the data may not be completely accurate, it demonstrates that A&P at least had knowledge that the discounts could drastically affect Borden's profits, and therefore, A&P should have inquired whether the prices

---

<sup>23</sup> Herschel Smith, A&P's Headquarter's Dairy Buyer, said that he received oral assurances from Harry Archer, Borden's Executive Vice President in New York, that this was a letter of availability (Tr. 1407). However, Archer denied having such a conversation (Tr. 1246-1247). After viewing both witnesses and examining all of the evidence, Judge Hinkes did not credit Smith's testimony (I.D. 96).



*Opinion of Commission*

were available to others. See *Fred Meyer, Inc. v. FTC*, *supra*, 359 F.2d at 365-67.<sup>24</sup> Of course, if the A&P-Borden contract was profitable for Borden before the switch to limited service and Borden would lose money after the change, then A&P should have doubted whether the new prices could be cost justified (See I.D. 91-93).<sup>25</sup>

Fourth, A&P's trade experience should have given it reason to know that Borden's private label prices were not cost justified. See *Automatic Canteen Co. v. FTC*, *supra*, 346 U.S. at 79-80 (Trade experience "can afford a sufficient degree of knowledge to provide a basis for prosecution."); *Kroger Co. v. FTC*, *supra*, 438 F.2d at 1378. As Judge Hinkes concluded (I.D. 97, 98, 127), A&P was familiar with the dairy industry generally and with the Chicago area specifically. Also, A&P knew that Borden's private label price was substantially lower than its branded label price because A&P bought both types of milk from Borden (See CX 75, 255; RX 66). Therefore, A&P should have known that its competitors, some of whom received limited service, were paying much more than A&P for the same product.<sup>26</sup>

---

<sup>24</sup> Citing *Automatic Canteen Co. v. FTC*'s language about puffing in a bargaining situation, 346 U.S. at 80 n. 24, A&P argues that Borden might very well have submitted a purposely inaccurate bid (Appeal at 45-47). At this point, A&P's evaluation of Joseph Malone, the Vice President of Governmental Controls and formerly the Comptroller of Borden's Central District and the employee who prepared the data, is relevant: A&P believed that Malone was "honest and forthright." (Tr. 1843). In addition, if we disregarded all studies in which a self-interest motive is present, then, of course, we must dismiss the studies prepared for A&P's cost justification defense.

<sup>25</sup> As noted at pages 23-24, we do not believe that complaint counsel has the burden of introducing a formal study demonstrating that the price differential is not cost justified and do not consider these calculations such a study.

<sup>26</sup> Of course, labels do not differentiate products for purposes of determining "like grade and quality." *FTC v. Borden Co.*, 383

*Opinion of Commission*

Finally, A&P's conduct after the private label agreement was consummated convinces us that A&P knew or had reason to know that any differences in service were not cost justified. First, in mid-November of 1965, Borden decreased the price A&P paid for Borden label products but at a much lower discount than it granted A&P on private label products (RX 66). Except for the small amount devoted to advertising, there was no difference in the cost to Borden of private and branded products. Therefore, A&P should have realized that the price was not cost justified (*See* I.D. 99). Second, in May of 1966, A&P accepted an increase on Borden label products which reflected increased container, labor, and social security costs, an increase which Borden apparently charged all of its purchasers. However, A&P at first refused Borden's request that the price of A&P's private label products be raised commensurately (CX 79, 81, 255B; Tr. 1050-1054) and later accepted only a proportionately smaller increase (Tr. 1056-1062; *See* CX 102, 103, 105, 106, 110).<sup>27</sup> Because A&P readily accepted the increases on branded milk, we infer that A&P believed that Borden was selling branded milk to some of A&P's competitors at delivery terms similar to those at which Borden was selling branded and unbranded milk to A&P, and therefore, considering Borden's small advertising expenses, A&P's private label discount was not cost justified. *See Automatic Canteen Co. v. FTC, supra*, 346 U.S. at 80.

---

U.S. 637, 640 (1966). The only benefit lost by A&P was advertising, which was a very small expense.

<sup>27</sup> This action is conceivably a second inducement by A&P of discriminatory prices and therefore, a separate and distinct violation of the Robinson-Patman Act (*See* I.D. 57, 58, 89, 101; Complaint Counsel's Proposed Findings, Vol. 1 at 119). Because we have found that A&P received an illegal price preference prior to these increases, we do not specifically address this claim.

*Opinion of Commission*

In conclusion, viewing all of these facts together, we find that complaint counsel fully established a *prima facie* case that A&P knew or should have known that the prices Borden charged it for private label products was not cost justified.<sup>28</sup> The burden then shifted to A&P to demonstrate that it did not have knowledge that the prices it received were not cost justified or, failing to establish that, that the prices were, in fact, cost justified.

We do not find persuasive A&P's assertions that it did not know nor should have known that the prices it received were not cost justified. Its statements concerning the meeting competition language in the negotiations and the "legal letter" are not convincing (*See* A&P's Proposed Findings at 76-86). In a post-hoc analysis of the cost data that Borden supplied it, A&P argued that the Borden study was not completely reliable (Appeal at 45-47). However, A&P did not show whether it had contemporaneous criticisms of the quality of the data nor whether it communicated any of its criticisms, perhaps in the form of additional inquiries, to Borden. As noted at page 27, this data does not have to be completely accurate but is useful in proving that A&P was on notice that the new contract could be unprofitable to Borden. Finally, A&P's post-agreement behavior is relevant to show what knowledge A&P had at the time the agreement was entered.

A&P introduced evidence which showed that A&P's Smith used a "2-2-2 formula" to evaluate the reasonableness of a bid. The formula states that a dairy can profitably sell milk for approximately six cents more per quart

---

<sup>28</sup> We are not convinced that because Borden spread the savings over eleven rather than thirteen items, A&P was on notice that the bid was not cost justified. Although generally we agree that "the same cost savings applicable to different products with different volumes would not likely be related to . . . cost savings" (I.D. 90), it is at least conceivable that the \$820,000 savings represented the amount Borden would save by switching to limited delivery service.

*Opinion of Commission*

than the dairy's cost for raw milk.<sup>29</sup> Although we agree that this formula is relevant in considering whether A&P had knowledge, it does not rebut complaint counsel's *prima facie* case. As noted, the formula was simply a reference point from which to estimate costs (Tr. 6399). It was developed from A&P's experience in negotiating for its private label supply of milk in New York and Massachusetts. Because the costs and conditions in the Chicago area were different (*E.g.*, In-plant wages: CX 25C, 26), it should have been adjusted. In fact, as A&P admits, the formula was never used to determine the exact measure of a dairy's cost but only to serve as a "workable rule of thumb." (Appeal at 49). Reliance on such a formula would be very irrational in light of all the other evidence (*See* I.D. 98).<sup>30</sup>

Since A&P did not present enough evidence on the issue of knowledge to shift the burden back to complaint counsel, it had to submit a cost justification study if it wished to prevail. The studies entered by A&P on the record (RX 233, 234) were prepared specifically for purposes of this litigation.<sup>31</sup>

We affirm Judge Hinkes' findings (I.D. 136-165) that A&P's cost justification studies "are so defective and inadequate as to furnish no evidentiary basis" to justify the price differential that A&P received for private label prod-

---

<sup>29</sup> Two cents each are allocated for cartons, plant costs and profits, and delivery costs (Tr. 6399).

<sup>30</sup> A&P's other arguments—for example, that A&P could get better prices on private labels in other parts of the country (Tr. 7326)—also do not adequately rebut complaint counsel's strong showing.

<sup>31</sup> Because we do not find the studies sufficiently reliable, we did not decide whether Borden's internal cost calculations (CX 54, 87, 206) are accurate. If A&P's studies adequately showed some type of cost justification, the Borden studies would have been considered as complaint counsel's rebuttal. Accordingly, we did not ascertain whether the A&P study (RX 232) which was offered to rebut Borden's internal cost calculations is accurate.

*Opinion of Commission*

ucts on the basis of Borden's cost savings (I.D. 165). Because the studies are so flawed, we would not find them persuasive under any reasonable standard. However, as we have stated, generally a buyer's cost justification study should meet the same standard that a seller's must. On the other hand, a buyer need not submit any study if complaint counsel fail to prove that the buyer knew or could be charged with knowledge that the prices were not cost justified. See *Automatic Canteen Co. v. FTC*, supra, 346 U.S. at 74.<sup>32</sup> We note in passing that we would be willing to lower the standard if it was demonstrated that the buyer could not obtain the necessary records from the seller to undertake the study. See *id.* at 79, 81. A&P alleges that hostility existed between Borden and itself (Appeal at 15-16; A&P's Proposed Findings at 8-9) but does not confirm that these "inherent conflicts" prevented it from obtaining records from Borden. In fact, the record shows that A&P was able to get the documents it needed.

A&P asserts that "the most egregious example" of the failure by Judge Hinkes to follow a liberal approach to its cost study is his rejection of the original derivation of Borden's delivery costs (Appeal at 53). The calculations, based on "time standards" developed in 1949 from studies made of Bowman Dairy deliveries in Chicago and confirmed by additional work in the 1950's and 1960's, are summary in nature. Also, the underlying data necessary to conduct an effective examination of their reliability were destroyed (Order, Sept. 16, 1974). In addition, Robert Havemeyer, the author of the A&P studies, did not participate in the collection of the data nor in the preparation of the standards (*Id.* at 2). Therefore, he could not be effectively cross-examined on the validity of the

---

<sup>32</sup> Of course, if the seller is joined in the Robinson-Patman action and relies on the cost justification defense, he will submit the cost justification study.

*Opinion of Commission*

underlying data.<sup>33</sup> For these, as well as other reasons, Judge Hinkes properly refused to admit the calculations. *Id.* This is not a matter of preferring one method of calculation over another. Judge Hinkes simply could not determine whether the calculations were even arguably reliable. *Cf. FTC v. Standard Motor Products, Inc.*, 371 F.2d 613, 622 (2d Cir. 1967).

A&P's arguments concerning the relevance of the Wisconsin research (RX 9, 11) are adequately dealt with by Judge Hinkes (*See* I.D. 139-142). We note, however, our disagreement with the Judge's general rejection of standardized costs (I.D. 143). If it could be proven that standardized costs are reflective of actual costs—a showing not made in this case—then we would be willing to accept standardized costs as a substitute for actual costs.<sup>34</sup>

The studies are unpersuasive for numerous other reasons. For example, the studies did not consider the fact that a portion of Borden's expenses were incurred only in connection with its dealings with A&P (*See* citations in I.D. 157-160). Without a study of these costs, one cannot ascertain the true cost differences between the costs of handling the A&P account and the costs of handling the accounts of other purchasers (*See* Tr. 9422). *See* Rowe, *supra* note 19, at 287 ("It would be hard to defend a cost study which lacked internal consistency by resort to analytic reasoning with respect to one factor that would vitiate another."). Furthermore, the studies do not allo-

---

<sup>33</sup> Havemeyer frequently was not helpful in describing the relationship of underlying data to the summaries. For example, when asked which study was not included in making certain observations, he stated, "I cannot tell you because the working papers . . . are no longer available." (Tr. 9130-9131).

<sup>34</sup> Even if the time calculations were acceptable, we would not find Havemeyer's calculations of delivery costs reliable. Some of the problems with the Havemeyer analysis are described in the initial decision (I.D. 144).



*Opinion of Commission*

cate costs according to the manner in which they were incurred (*See* citations in Complaint Counsel's Proposed Findings, Vol. II at 295-296), do not allocate overhead expenses according to accepted accounting principles (*Id.* at 296-297; *see FTC v. Standard Motor Products, Inc.*, *supra*, 371 F.2d at 622), and inaccurately assign costs to certain customers (*E.g.*, citations in I.D. 162).

But the most important task in evaluating the studies lies in ascertaining the credibility, intelligence, and experience of Mr. Havemeyer. Judge Hinkes found (I.D. 137) that Havemeyer did not base his studies on any personal knowledge of Borden's operations. Because Havemeyer was unfamiliar with Borden's operations and activities, he did not consider many relevant factors (*See* discussion in I.D. 146-152). In addition, Havemeyer did not review all of the available evidence to determine the completeness of his studies. For example, when asked if he made any check to determine if all loading expenses were included on a certain ledger, he stated he did not but added that his staff had made "some type of check." When asked about the type of check, he stated that he could not be specific (Tr. 7520). His experience with Robinson-Patman cost studies was limited to preparation of a study for one other litigated case, *United States v. Borden Co.*, 370 U.S. 460 (1962), in which the study was rejected by the Court because Havemeyer failed to classify stores adequately. *Id.* at 470-471.

A&P asserts that Judge Hinkes erred in finding that the studies failed to classify customers properly (Appeal at 55-56; *see* I.D. 154-155). The studies do, in fact, differentiate stores on the basis of "limited service" and "full service." However, it is clear that stores differ in terms of all types of expenses, including delivery expense, clerical expense, product waste, selling expense, credit loss, merchandising expense, and overhead. More important, the stores also differ in volume of purchases.

*Opinion of Commission*

The Supreme Court in *United States v. Borden Co.*, *supra*, criticized requiring cost justification on a customer by customer basis. 370 U.S. at 468. It tried to strike a balance which would permit group averaging where the group members were sufficiently alike especially "on the essential point or points which determine the costs considered" to make the averaging a reasonable indication of the cost of dealing with individual members. *Id.* at 469. We believe that the A&P classification makes some sense and could meet the *Borden* test although we are troubled by the volume differences between stores. *See Foremost Dairies, Inc.*, 62 F.T.C. 1344, 1361-1362 (1963), *aff'd, supra*. However, we do not have to decide this issue because the studies are so fundamentally flawed.<sup>35</sup>

For all of these reasons, we find that the cost justification studies are inadequate to shift the burden back to complaint counsel. Therefore, we find that A&P did not prove that the differential it received was cost justified.

*IV. Count III: Combining To Stabilize Prices*

Count III charged that A&P and Borden entered into a combination having the tendency or effect of stabilizing and maintaining retail and wholesale prices for milk and

---

<sup>35</sup> Similarly, we do not have to reach the question whether the studies are invalid because they determine cost for A&P stores on an average basis and compare this average with the specific costs of serving allegedly injured competitors (Appeal at 56-57; *see* I.D. 156). We note, however, that such a procedure could hide large discrepancies in size among A&P stores. And size, of course, is often related to cost differences. *See National Dairy Products Corp. v. FTC, supra*, 395 F.2d at 525-26, *aff'g* 70 F.T.C. 79, 193-196, 207 (1963). Finally, we also do not have to address complaint counsel's assertions that the studies should cover the entire discrimination period (*See* Complaint Counsel's Proposed Findings, Vol. II at 300-305). We think, however, that such a requirement is unduly burdensome.

*Opinion of Commission*

other dairy products.<sup>36</sup> Judge Hinkes dismissed the count. Complaint counsel argue that Judge Hinkes applied the wrong standard of proof—that he did not view the evidence in the case *in toto* but looked at each part separately. According to complaint counsel (C.C. Appeal at 3-4, 7-8), Judge Hinkes required that each element of the conduct of the parties be sufficient to demonstrate the existence of an unlawful combination, contrary to the teaching of such cases as *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 494 (9th Cir. 1952).

Complaint counsel emphasize that the communications between A&P and Borden and the “needs” of these parties show that a combination took place (*E.g.*, C.C. Appeal at 9, 18).<sup>37</sup> Concerning the communications, we agree with Judge Hinkes (I.D. 199) that the record contains no evidence suggesting that Borden and A&P discussed the price A&P would charge retail customers or the price Borden would charge A&P’s competitors, except to note that a price differential at the retail level between branded and unbranded products might create problems. Viewed together as well as separately, we do not find that the statements relied on by complaint counsel show that a combi-

---

<sup>36</sup> Although the count charges that the combination had a tendency to stabilize prices at both the retail and wholesale level, the thrust of complaint counsel’s case is directed to the retail level aspect (*See* I.D. 179-187).

<sup>37</sup> Complaint counsel presented other arguments which we find unconvincing. For example, they note that the \$820,000 savings was not made on any straight discount basis but spread by Borden over the 11 different product lines. Thereby Borden could influence A&P’s retail price (Tr. 5233-5234). But as A&P’s expert economic witness, Dr. Markham, stated (Tr. 7041-42), a distribution of cost savings among the various products was rational and in accordance with customary industry practice. In addition, each item was ordered separately on a demand basis, and therefore, a single price for one year’s purchase of all 11 items could not be quoted (*See* I.D. 194).

*Opinion of Commission*

nation to stabilize price existed.<sup>38</sup> The statements do not in any way convince us that A&P ever gave Borden the assurance that A&P would not create a price differential at the retail level.

We also do not understand why A&P and Borden needed to enter into a combination to stabilize prices. Their pre- and post-agreement conduct show only that they were acting as economically rational businessmen. Although clearly adversaries in their negotiations—A&P wanting the lowest price possible and Borden the highest—both A&P and Borden were strongly motivated by independent causes to maintain existing dairy prices.<sup>39</sup>

A&P hoped that by switching to private label milk, it could obtain lower costs and increase its gross margin (*E.g.*, Tr. 1400-1401). This was its whole purpose in negotiating the private label agreement with Borden, not passing lower costs on to customers to increase volume. We note that throughout the A&P-Borden negotiations, no provision was ever discussed for increases in volume of A&P's previous sales. We infer from this that the parties never contemplated that A&P would use its lower cost to lower price and thereby increase volume. Were A&P to lower its retail price, A&P would not achieve its immediate goal: to maximize profits (*See* Tr. 5230; 7038). Also, A&P feared that if it lowered the retail price of milk, Borden might be forced to give a similar wholesale discount to A&P's competitors. In addition, A&P was aware that the price it obtained from Borden cut Borden's profit margin to a

---

<sup>38</sup> These include the "sensitiveness of the market (CX 12A)," the "depressed competitive situation (CX 18P)," and comments at the May 26, 1965, meeting between A&P and Borden (CX 19).

<sup>39</sup> The evidence submitted relating to market structure (*See* C.C. Appeal at 19-23) convinces us that A&P and Borden lacked the ability to stabilize prices (*See* Borden's Answering Brief at 31-37). Therefore, this evidence does not buttress complaint counsel's position that a combination took place.

*Opinion of Commission*

point at which Borden might be driven out of the market if the prices that Borden charged decreased further.

Borden had recently completed building a large plant in Woodstock, Illinois and was willing to sacrifice some price to increase volume and thereby operate efficiently (Tr. 217, 5230). Especially, Borden needed to keep its major customer, A&P (See CX 42D). Borden did not want A&P to use a private label at all but was ultimately forced to offer to provide one. Borden then sought to minimize the substantial price concessions A&P requested. Unless such discounts were the only way to make use of idle machinery at Woodstock, Borden did not want to give other potential purchasers the same discount.<sup>40</sup> However, if A&P charged a lower price on private label products and thereby precipitated a price war,<sup>41</sup> Borden would be forced to extend the discount to others. Since Borden's dairy business was in a precarious financial position, such action could conceivably drive it to the point where it would have to withdraw from the Chicago market. Therefore, because it was in both parties' interest for A&P to maintain the prevailing price on its private label dairy products, there was no comprehensible reason for A&P and Borden to construct an illegal combination to achieve that end (See I.D. 199). We decline to construct one for them.

Of course, combinations having any tendency or effect of stabilizing prices are unlawful. See *United States v. Container Corp.*, 393 U.S. 333, 336-338 (1969); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). Although complaint counsel has introduced only circum-

---

<sup>40</sup> In fact, because Borden probably wanted to increase volume, it considered offering the discount to others. Its counsel, however, advised Borden that such action would destroy Borden's meeting competition defense (Tr. 1076).

<sup>41</sup> Although, as noted, A&P and Borden lacked the ability to stabilize the market, A&P was large enough to start a price war.

*Opinion of Commission*

stantial evidence to prove the existence of a combination intended to stabilize the prices in a given market, we recognize that such evidence may well be sufficient. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 298, 221 (1939); *Treasure Val. Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 208 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974). The problem is that complaint counsel's circumstantial evidence provides more support for the proposition that both parties acted independently in deciding their pre- and post-agreement strategies than for the inference that they entered into an illegal combination. And, even if the circumstantial evidence here gives equal support to inconsistent conclusions, it is insufficient to establish liability. *Pevely Dairy Co. v. United States*, 178 F.2d 363, 370 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950).

We conclude that both A&P and Borden acted as rational and law abiding businessmen in this regard. *See Callaway Mills Co. v. FTC*, 362 F.2d 435, 441-42 (5th Cir. 1966). They did not need to engage in an illegal combination because maintenance of the retail price of milk was in the independent interests of each. "An inference of conspiracy would only arise from similar business conduct if it appeared more to the interest of competitors to adopt different practices." *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 747 (N.D. Cal. 1959), *aff'd*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963). That A&P did not lower the price it charged consumers and that Borden did not immediately lower the price it charged its purchasers "should be deemed neither surprising nor illegal." *North Carolina v. Chas. Pfizer & Co.*, 384 F. Supp. 265, 284 (E.D.N.C. 1974). Therefore, we reject complaint counsel's arguments and affirm Judge Hinkes' dismissal of Count III.



*Opinion of Commission**V. A&P's Due Process Claim*

A&P asserts that it was denied due process of law by the Commission's delay in instituting these proceedings. It makes this claim as to all three counts. Because Counts I and III are dismissed, we respond to the claim only as it relates to Count II.

As early as February of 1967, A&P was informed that the Commission had commenced an investigation of its private label agreement with Borden and that the purpose and scope of the investigation was to determine whether an illegal price discrimination in violation of the Robinson-Patman Act and the Federal Trade Commission Act had occurred (*See* Affidavit of Richard A. Palewicz attached to Complaint Counsel's Answer to A&P's Motion to Dismiss, Oct. 20, 1972). At that point, less than 1½ years after the agreement and less than 9 months after the renewed inducement, *see* note 27 *supra*, A&P was on notice of possible litigation, especially with regard to the Robinson-Patman Act.<sup>42</sup> If A&P was, in fact, indifferent to this possibility of litigation, the Commission is not at fault. Certainly, A&P's lack of concern does not lead us to conclude that A&P was denied due process. In addition, we reiterate our position as stated in our Order Denying A&P's Motion to Dismiss, Jan. 19, 1973, that considering the complexity of this case as it was presented and argued by complaint counsel and A&P, the time taken to conduct the investigation leading to the issuance of the complaint in 1971 was not excessive. *Id.* at 4.

Because we have concluded that the delay in notifying A&P of the investigation and in bringing the complaint is

---

<sup>42</sup> In 1966, the Justice Department initiated an investigation of the agreement to ascertain whether the agreement violated the order issued against Borden for discriminations in favor of A&P and Jewel Tea Company (Complaint Counsel's Answer at 3, October 20, 1972).

*Opinion of Commission*

not unreasonable, we do not have to reach the question of prejudice to conclude that A&P has not been denied due process.<sup>43</sup> *United States v. Wilson*, 357 F. Supp. 619, 620 (E.D. Pa. 1973); see *United States v. Marion*, 404 U.S. 307, 324 (1971). However, because we invited A&P to renew this argument (Order at 5, Jan. 19, 1973), we address it now. We agree with Judge Hinkes (I.D. 213) that any prejudice that A&P has suffered from the passage of time is minimal and no more than that suffered by complaint counsel. Therefore, we reject A&P's claims.

*VI. The Remedy*

Since we have decided to dismiss Counts I and III, the final order refers only to the Count II violation. We have made three substantive changes in Judge Hinkes' order. First, the order states that in the future A&P has the burden of going forward with the meeting competition defense. Of course, this provision comes into effect only when A&P knows or has reason to know that prices offered to it are lower than those offered to others. We believe that such a requirement is not inconsistent with *Automatic Canteen Co. v. FTC*, *supra*, 346 U.S. at 79 n. 23. See *American Motor Specialities Co.*, 55 F.T.C. 1430, 1466-67 (1959), *aff'd*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).<sup>44</sup> As demonstrated in this case, evidence that

---

<sup>43</sup> It should be noted that the cases defining unreasonable delay cited by A&P are criminal cases where, unlike the situation in an FTC proceeding, the Sixth Amendment and other restrictive procedures and safeguards are applicable. See, e.g., *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1387-1388 (5th Cir. 1971); *United States v. Roundtree*, 420 F.2d 845, 852 (5th Cir. 1969).

<sup>44</sup> The Court in *Mid-South Distributors v. FTC*, *supra*, 287 F.2d at 517, stated that the Commission has the burden of going forward with evidence to show that the buyer knew that the seller could not assert the meeting competition defense. Although we are

*Opinion of Commission*

the seller's offer was made to meet a competing seller's offer is more readily available to the buyer than to the seller. Also, this new provision is not only reasonably related to the unlawful practice found to exist, *see FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957), but is, in fact, directly related. Borden stated explicitly that it was relying on the meeting competition defense to justify the price it quoted to A&P. A&P knew that Borden had, in fact, beaten the competitive offer yet did not communicate this to Borden. If it had, Borden might very well have withdrawn its bid. *See Kroger Co. v. FTC*, *supra*, 438 F.2d at 1376-77. We believe that this provision will render it substantially less likely that A&P will violate the Robinson-Patman Act in the future.

Second, the order requires A&P to distribute a copy thereof to A&P's suppliers of milk and other dairy products as well as to all of its operating divisions. By so doing, A&P will make suppliers aware that A&P is subject to an order that prohibits it from violating the Robinson-Patman Act. The notification requirement is also related to the unlawful practice. *See FTC v. Colgate-Palmolive Co.*, *supra*; *FTC v. National Lead Co.*, *supra*. The Robinson-Patman Act was enacted in large part to prohibit large buyers, especially chain stores, from using their purchasing power to pressure suppliers into granting unfair discounts. *See, e.g.*, H.R. Rep. No. 2287, 74th Cong. 2nd Sess.

---

not convinced that complaint counsel have this burden, we note that they assumed it and sustained it in this case.

Of course, the Commission can "forbid acts lawful in themselves . . . [or] compel affirmative acts of compliance" to restore and rehabilitate competitive conditions. *Ekco Products Co.*, 65 F.T.C. 1163, 1216 (1964); *see FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965). Therefore, even if this burden is more stringent than that described in *Mid-South Distributors*, it can be imposed on A&P as an exercise of the Commission's remedial powers. *E.g.*, *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

*Opinion of Commission*

3 (1936); 80 Cong. Rec. 6621, 7324, 7887, 8104 (1936). The Courts have also emphasized the need to prohibit pressure tactics from large buyers. *E.g.*, *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960). The record in this case shows A&P exerted such pressure on Borden. Suppliers should be made aware that if A&P exerts similar pressure on them, such a practice is illegal.

Third, the wording of the cost justification proviso is changed to make it consistent with the holding in *Automatic Canteen Co. v. FTC*, *supra*, 346 U.S. at 74.<sup>45</sup> Complaint counsel object to the wording of the proviso because it does not place upon A&P the burden of going forward with the cost justification defense. Pursuant to *Automatic Canteen*, *id.* at 79, we find that either the seller or complaint counsel (if the Commission has brought a Section 2(f) complaint) must retain this burden because both are better able to develop the relevant information than is the buyer.

A&P objects to the order because it is nationwide in scope. We see no injustice in making the order nationwide. In finding the nationwide order appropriate, we have considered the frequency and duration of the violations, the business and competitive history of A&P, and the likelihood that A&P knew that it was violating the Robinson-Patman Act. *See Joseph A. Kaplan & Sons, Inc. v. FTC*, 347 F.2d 785, 789 (D.C. Cir. 1965). A&P's private label contract was the result of a nationwide program. It was initiated and supervised by A&P's New York dairy headquarters. This specific aspect of the nationwide program covered more than 200 A&P stores located in Indiana and

---

<sup>45</sup> We concur with the Court in *Mid-South Distributors v. FTC*, *supra*, 287 F.2d at 520, that the *Automatic Canteen* Court's use of double negatives is "awkward." Nevertheless, we believe that such use conceivably makes the standard more restrictive than the positive approach, and therefore, we have decided to retain it in this order.

*Opinion of Commission*

Illinois, lasted for more than six years, and resulted in substantial discriminations against competitors of A&P. The purpose of A&P's program was to increase its gross margin on milk products, an extremely important line, and thus to improve its overall gross profit position.

Complaint counsel object to the order because it does not include all products purchased by A&P for resale. Although we find some merit in the position that the conduct challenged in this case related to A&P's entire business and that A&P could conceivably evade the order by turning its attention to other products, we cannot ignore the realities of the kinds of negotiations that go on with respect to a company with thousands of stores dealing in tens of thousands of products. We also note that only A&P's dairy headquarters was involved in this contract. Although we believe that an all products order could be enforced, *see FTC v. Ruberoid Co.*, *supra*, 343 U.S. at 473; *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *Foremost Dairies, Inc. v. FTC*, *supra*, 348 F.2d at 681-82, we have decided to exercise our discretion and limit the order to milk and other dairy products.

We reject A&P's claim that "it is impossible to infer that, unless an order is entered, A&P will hereafter engage in the conduct alleged in the Complaint." (Appeal at 71). As noted, the purpose of A&P's program was simply to increase its gross margin on milk and other dairy products and thereby to improve its overall gross profit position. If merchandising methods now being relied upon by A&P to increase revenues fail, A&P might very well again feel the need to pressure small dairies to give A&P an unlawful discount and thereby increase its gross profits.

We also reject the contention that this case is stale. *Cf. Columbia Broadcasting System, Inc. v. FTC*, 414 F.2d 974, 981-82 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970). In fact, A&P did not terminate its relationship with Bor-

*Opinion of Commission*

den until 1972, four months after issuance of the complaint and five years after commencement of the investigation.<sup>46</sup> The dairy and retail food industries have not drastically changed in the last few years.

Finally, we note that, although not specifically mentioned in the order, A&P is still entitled to all statutory defenses in any subsequent action enforcing the order. *See FTC v. Henry Broch & Co.*, 368 U.S. 360, 366-67 (1962); *FTC v. Ruberoid Co.*, *supra*, 343 U.S. at 475-76.

Thus, for the foregoing reasons, we find that A&P violated Section 2(f) of the Robinson-Patman Act. We, therefore, enter the appended order.

April 29, 1976

---

<sup>46</sup> A&P states that it terminated arrangements with Borden because it was offered lower prices by other dairy suppliers (Appeal at 1 n. 2).



**Opinion of the Court**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

No. 922—September Term, 1976.

(Argued March 24, 1977                      Decided June 21, 1977.)

Docket No. 76-4179

---

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

---

Before :

ANDERSON and MESKILL, *Circuit Judges*, and MARKEY, *Chief Judge*, U. S. Court of Customs and Patent Appeals.\*

---

Petition by The Great Atlantic & Pacific Tea Company, Inc., for review of an order of the Federal Trade Commission, based on its determination that petitioner had violated §2(f) of the Robinson-Patman Act (15 U.S.C. §13(f)).

Petition denied and enforcement granted.

---

ANDERSON, *Circuit Judge*:

This is a petition for review of an order of the Federal Trade Commission (FTC or the Commission) in the matter of *The Great Atlantic & Pacific Tea Co., Inc.*, — F.T.C.

---

\* Sitting by designation.

*Opinion of the Court*

— [1973-76 Transfer Binder] CCH Trade Reg. Rep. ¶21,150 (1976) (hereinafter cited as *A & P*). The Commission found that A & P violated §2(f) of the Robinson-Patman Act, as amended, 15 U.S.C. §13(f)<sup>1</sup> by knowingly inducing or receiving illegal price discriminations from

---

<sup>1</sup> 15 U.S.C. §13(f) provides:

“It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.”

15 U.S.C. §§13(a) and (b), provide in pertinent part:

“(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, whether either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .”

“(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination. *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.”

*Opinion of the Court*

The Borden Company (Borden) in the purchase of "private label" milk in the Chicago area from 1965 through 1972. We deny the petition.

Now in its seventh year of litigation, this case has developed a voluminous record and thorough arguments and briefs by both sides. The Commission has succinctly set out the underlying facts in its extensive opinion, *A & P*, — F.T.C. at —, ¶21,150 at 21,039-40. The case arose from A & P's attempt in the mid-1960's to secure savings in its dairy products business by switching from selling "brand label" milk in its stores (*e.g.*, milk sold under the brand name of the supplying dairy) to selling "private label" milk (*e.g.* milk sold under the A & P label). Pursuant to directions from A & P's headquarters in New York, A & P's "Chicago Unit,"<sup>2</sup> made up of over 200 A & P stores in northern Illinois, plus about 35 in neighboring portions of northwestern Indiana and a few stores in Iowa, began negotiations with Borden for the supply of A & P private label milk and other dairy products. In August of 1965, Borden submitted a bid, premised on A & P's acceptance of limited delivery service, which Borden claimed would have reduced A & P's annual dairy-costs by \$410,000. Not content with this offer, A & P sought and received a lower bid from a competing dairy, Bowman Dairy (Bowman).

Armed with a lower bid, A & P turned its attention back to Borden (contrary to its usual practice, which is to allow only one bid from a supplier, *A & P*, — F.T.C. at —, ¶21,150 at 21,039). Elmer Schmidt, A & P's Chicago Unit buyer, telephoned Borden's Chicago chain store sales manager, Gordon Tarr, and told him that Borden's initial offer was not "in the ball park." Pressed for details as to what would be "in the ball park," Schmidt told Tarr

---

<sup>2</sup> A & P states in its Brief in this appeal that its Chicago Unit was one of 32 similar "Units" reporting to seven "Divisions," into which A & P had grouped its over 4,000 retail grocery stores.

*Opinion of the Court*

that a \$50,000 improvement "would not be a drop in the pocket." Borden then had to decide whether to re-bid. At the time, A & P was one of Borden's major customers in the Chicago area. In addition, Borden had just invested over five million dollars in a new dairy processing facility in Woodstock, Illinois; losing the A & P account would have confronted Borden with the inefficient use of the new plant. Ralph Minkler, President of Borden's Chicago Central District, testified before the Administrative Law Judge that he was told by his superiors to "save the [A & P] business." Accordingly, Borden offered to double A & P's expected annual savings under a private label program to \$820,000. Minkler emphasized to A & P's Schmidt at the time this second bid was offered that it was being made only to meet the rival Bowman bid and that Borden knew "of no other way to justify this." Before accepting the second and final Borden bid, A & P's Schmidt requested a letter from Borden to the effect that the prices being offered A & P were proportionally available to others. Borden's "availability letter" stated only that it felt its prices were proper under applicable law and that it was prepared to defend them.

The second Borden bid was then reviewed by Herschel Smith, A & P's National Director of Purchases in New York. Smith testified that at the time, he regarded the second Borden bid as "substantially better" than the Bowman bid. As for Borden's "availability letter," Smith testified that he did not initially understand Borden's letter to mean that other Borden customers could enjoy proportionally lower prices such as those agreed upon with A & P, but that after consultation with a Mr. Archer (who had no recollection of such a discussion) he became convinced that Borden's letter was one of availability for all customers. After review by A & P's legal department, the second and final Borden bid was accepted by A & P.

*Opinion of the Court*

Borden began serving A & P in the Chicago area with private label dairy products in November of 1965.

The above constitute the factual nucleus of the three-count complaint filed against A & P in 1971. Count I charged A & P with misleading Borden in the course of negotiations for the private label contract, in that A & P allegedly failed to inform Borden that its second and final bid had not merely "met", but substantially "beaten," Bowman's competitive bid. Such conduct by A & P was said to constitute a violation of §5 of the Federal Trade Commission Act, 15 U.S.C. §45, along with the policy of the Robinson-Patman Act, 15 U.S.C. §13. Count II, based on the same conduct by A & P, charged a violation of §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f)<sup>3</sup> (knowing inducement or reception by A & P of price discriminations from Borden which are in turn prohibited by §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a)). Finally, Count II charged a combination of A & P and Borden to stabilize and maintain the retail and wholesale prices of milk and other dairy products, contrary to §5 of the Federal Trade Commission Act, 15 U.S.C. §45.

Following an extended discovery period and hearing, the latter extending over 110 days, the Administrative Law Judge found that as to Count I, A & P "ha[d] acted unfairly and deceptively" in accepting a price offer from Borden offered to meet competition from Bowman Dairy, "when in fact such [a] meeting-competition-defense<sup>4</sup> was not available and without informing Borden of this fact in violation of the policy of Section 2 of the amended Clayton Act [the Robinson-Patman Act] and in violation of Section 5 of the Federal Trade Commission Act." Like-

---

<sup>3</sup> Quoted in note 1, *supra*.

<sup>4</sup> The "meeting competition" defense to a charge of price discrimination, as incorporated in 15 U.S.C. §13(b), quoted at note 1, *supra*, is available to both buyers and sellers when charged with violations of the Robinson-Patman Act, 15 U.S.C. §13.

*Opinion of the Court*

wise as to Count II, A & P was found to have violated §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), in knowingly inducing or receiving price discriminations in the purchase of fluid milk and other dairy products. As to Count III, however, which had charged a combination to stabilize and maintain milk prices between A & P and Borden, the Administrative Law Judge held that the FTC had not satisfied its burden of proof. Accordingly, Count III was dismissed.

On review by the Commission, the Administrative Law Judge's holding as to Count I, grounded on A & P's alleged deceptive practices in bargaining with Borden, was reversed. The Commission characterized the charge as "directed to the question of what must legally be disclosed during contract negotiations." *A & P*, — F.T.C. at —, ¶21,150 at 21,040. That is, knowing that Borden's final bid was substantially better than Bowman's bid and also knowing that Borden would defend the legality of its bid, if necessary, on the ground that it was merely attempting to meet, but not beat, a competitor's bid from Bowman Dairy, A & P refrained from affirmatively disclosing to Borden the terms of Bowman's bid and accepted the Borden offer. The Commission did not agree with the Administrative Law Judge that such behavior constituted an unfair trade practice under the Federal Trade Commission Act, 15 U.S.C. §45, primarily because such a holding would be "contrary to normal business practice and, we think, contrary to the public interest." *A & P*, — F.T.C. at —, ¶21,150 at 21,040.

In spite of the above holding as to Count I, the Commission nonetheless affirmed the finding of A & P's liability under §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), ruling that (1) the sales by Borden to A & P had met the statute's jurisdictional requirements that at least one purchase said to involve price discriminations "in commerce"; (2) that the evidence demonstrated the presence



*Opinion of the Court*

of price discriminations, which resulted in competitive injury, *A & P*, — F.T.C. at —, ¶21,150 at 21,042-43; and (3) by virtue of its trade experience and common sense, *A & P* “knew or should have known that it was the beneficiary of a price discrimination having the requisite harmful competitive effects.” *Id.* at —, ¶21,150 at 21,043.

*A & P* had interposed two defenses to this charge of illegal price discrimination, the first of which was that it was protected from §2(f) liability through 15 U.S.C. §13(b),<sup>5</sup> which allows a *seller* charged with giving illegally discriminatory prices to rebut a *prima facie* case by showing that the lower price afforded a purchaser was “made in good faith to meet an equally low price of a competitor.” The Supreme Court has ruled in *Automatic Canteen v. FTC*, 346 U.S. 61, 74 (1953), that a buyer charged under §2(f) is not liable if the prices he induces are either within the “meeting competition” defense of the seller or not known by the buyer not to be within one of those defenses. *A & P* argued that the final Borden bid had been submitted by Borden in a good faith effort to meet an equally low price of a competitor (here, Bowman Dairy) and *A & P* was therefore unaware that Borden’s bid could not be protected by the seller’s “meeting competition” defense. That is, transferring Borden’s potential “meeting competition” defense to *A & P*, the purchaser could not be held liable. Following *Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), however, the Commission ruled that:

“[W]hen a buyer is charged with violating Section 2(f) [15 U.S.C. §13(f)], the price he induces must come within the meeting competition defense not only from the seller’s point of view but also from the

---

<sup>5</sup> Quoted in note 1, *supra*.

*Opinion of the Court*

buyer's." *A & P*, — F.T.C. at —, ¶21,150 at 21,043.

The mere fact that had Borden been charged with giving illegal price discriminations under §2(a) (which it was not), it *could* have defended on the ground that its final bid was merely a good faith effort to meet what it believed to be Bowman's competitive bid, was not sufficient in the Commission's view, to absolve A & P of any wrongdoing, because A & P was aware of the price terms of *both* Borden's and Bowman's bids and had concluded in 1965 that Borden had substantially beaten its competitor. Also pursuant to its application of *Kroger, supra*, the Commission further ruled against A & P's contentions that it could not be charged with knowingly inducing or receiving illegal price discriminations under §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), unless Borden had been found to have given such illegal prices under §2(a) of the same Act, 15 U.S.C. §13(a). *A & P*, — F.T.C. at —, ¶21,150 at 21,044.

A & P's second defense was grounded on §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a),<sup>6</sup> which exonerates sellers who give discriminatory prices on goods of like grade and quality if the discriminations are justified by the seller's manufacture, sale or delivery cost savings in servicing one purchaser over another. Much like the "meeting competition" defense, the purchaser may defend here on the alternative grounds that the discriminatory prices induced or received were in fact "cost justified" or that the buyer was unaware of the unavailability of that defense to the seller. *Automatic Canteen, supra*, 346 U.S. at 74; *Rowe, Price Discrimination under the Robinson-Patman Act*, §14.7 at 438 (1962) (hereinafter cited as *Rowe*). Likewise here, A & P was unsuccessful in establishing its

---

<sup>6</sup> Quoted in pertinent part in note 1, *supra*.

*Opinion of the Court*

"cost justification" defense. The cost study presented by A & P to show the actual cost justification of Borden's prices was found "'so defective and inadequate as to furnish no evidentiary basis' to justify the price differential that A & P received for private label products on the basis of Borden's cost savings . . . ." *A & P*, — F.T.C. at —, ¶21,150 at 21,047-48. As for A&P's knowledge that Borden could not justify its prices, the Commission found that FTC counsel had more than met their "initial burden" of showing such knowledge. This conclusion was buttressed by the facts that Borden had submitted its final offer solely on the basis that it was meeting competition, which put A & P on notice of the probable absence of a Borden cost justification defense, Borden's failure to furnish A & P with a clear "letter of availability" (stating that A & P's competitors could enjoy the same prices on a proportional basis), Borden's submission of cost data during the negotiations showing that it would either lose money or make a minimal profit on "private label" sales to A & P, as well as A & P's trade experience. Further, the Commission noted that after Borden had begun servicing A & P with both private label and Borden-label dairy products, Borden had tried to increase prices on its products to cover rising container, labor and social security costs. While accepting price increases on Borden-label products, A & P had initially refused a commensurate increase on private label prices, and notwithstanding the fact that the products were of like grade and quality and that Borden's costs for private and brand label dairy products were virtually the same. *A & P*, — F.T.C. at —, ¶21,150 at 21,046-47. In short, A & P's "meeting competition" and "cost justification" defenses failed and it was found to have violated §2(f) of the Robinson-Patman Act.

As for the third charge against A & P, combining with Borden to stabilize dairy prices, the Administrative Law

*Opinion of the Court*

Judge's dismissal of the count was affirmed by the Commission, because the evidence presented simply did not support the charge that "A & P ever gave Borden the assurance that A & P would not create a price differential at the retail level." *A & P*, — F.T.C. at —, ¶21,150 at 21,049.

Finally, A & P's claim that it was denied due process of law by the Commission's delay in initiating the proceedings was dismissed on the grounds that any delays were reasonably related to the complexity of the case and to A & P's own failure to evince any concern for a speedy resolution of the matter. The substantive remedy imposed by the Commission was the nationwide distribution of the Commission's order to its milk and dairy products suppliers as well as placing the burden of going forward with a meeting-competition defense in the future on A & P. A & P unsuccessfully challenged the nationwide scope of the distribution order.

On this appeal, then, the sole remaining issue for our consideration is the Commission's holding that A & P violated §2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), by knowingly inducing or receiving illegally discriminatory prices from Borden. We first take up briefly A & P's jurisdictional objection, as well as the evidentiary basis for the Commission's conclusion, and then move on to the heart of this appeal, A & P's contention that the FTC misapplied the law with respect to its defenses of "meeting competition" and "cost justification".

A & P's jurisdictional challenge rests on the point that the Robinson-Patman Act prohibits illegal price discriminations only "where either or any of the purchasers involved in such discrimination are *in commerce* . . ." 15 U.S.C. §13(a) (emphasis added), and upon A & P's assertion that Borden, in the circumstances of this case, was not in interstate commerce. This language has been inter-

*Opinion of the Court*

preted recently in *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974), to require *more* than a showing that the allegedly anticompetitive activities "affect commerce" as is the case with an action under §1 of the Sherman Act, 15 U.S.C. §1. 419 U.S. at 195. *See, Rowe*, §4.9 at 78, *et seq.* In *Gulf Oil*, *supra*, a private antitrust action including Robinson-Patman charges against various *sellers* of liquid asphalt, the Court ruled that the alleged illegally discriminatory sales must have occurred in the course of the seller's interstate activities and that at least one of the sales which, when compared with another, gave rise to a price discrimination, must have been made in interstate commerce. 419 U.S. at 195. Applying this test to the situation at hand, where a *buyer* has been charged with inducing or receiving illegally discriminatory prices, the Robinson-Patman Act may be invoked where at least one of the purchases by a buyer engaged in interstate activities, which gave rise to the allegedly illegal price discrimination, was in interstate commerce. In this case, A & P's "Chicago Unit" bought brand and private label milk from Borden for individual A & P stores in both Illinois and Indiana. "[S]ubstantially all of the private label milk sold to A & P came from Borden's Woodstock, Illinois, processing plant. The plant, in turn, acquired approximately 60% of its milk from Wisconsin dairy farmers. *A & P*, — F.T.C. at —, ¶21,150 at 21,042. While there is no doubt, then, that A & P milk purchases for the chain's Indiana stores were "in commerce" for Robinson-Patman purposes, the only remaining question is whether the Illinois-based stores' purchases from Borden were interstate transactions as well. The Commission concluded that they were, inasmuch as Borden acquired most of its milk from Wisconsin and the raw milk was not substantially altered, chemically or otherwise, by processing at the Woodstock plant. We agree. Much as in *Foremost Dairies v. FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965),

*Opinion of the Court*

a prior price discrimination action also involving fluid milk, the milk here passed "in a steady flow from the farms in . . . [Wisconsin] through the . . . [Woodstock, Illinois] processing plant, where it underwent a rather negligible processing operation, which did not change its character appreciably, to the shelves of retail grocery establishments in . . . [the Chicago area]." 348 F.2d at 677 (footnote omitted.) Accordingly, A & P's milk purchases from Borden in both Illinois and Indiana were "in commerce" for purposes of Robinson-Patman Act jurisdiction,<sup>7</sup> which is thus plainly established.

The next issue is whether the Commission made out a *prima facie* violation of §2(f), 15 U.S.C. §13(f), by showing the knowing inducement or reception by A & P of illegal price discriminations "where the effect of such discrimination[s] may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . . ." 15 U.S.C. §13(a). The Commission must show *both*, i.e., that the prices received by A & P from Borden were lower than its competitors and that A & P knew that the prices it received violated §2(a), the provision prohibiting the

---

<sup>7</sup> A & P's argument that as to products other than fluid milk (i.e., cottage cheese, fortified skim milk, buttermilk, eggnog, onion dip and sour cream) supplied by Borden under the private A & P label, there was no Robinson-Patman jurisdiction is well-based and correct. These products were chemically changed from their origin as raw milk by a variety of processes and additions at Borden's Woodstock plant. See, i.e., *Red Apple Supermarkets, Inc. v. Del-town Foods, Inc.*, 419 F. Supp. 1256 (S.D.N.Y. 1976) (New York producer of Light 'n' Lively Milk, which involves blending dried, non-fat milk solids with raw, whole milk and liquid skim milk cannot be charged with illegal price discrimination under §2(a) of the Robinson-Patman Act based on the fact that some of the raw, whole milk used in the production of Light 'n' Lively originated on Pennsylvania farms); *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 287 F.2d 265 (7th Cir.), cert. denied, 368 U.S. 829 (1961) (butterfat used in the manufacture of ice cream, originating in Wisconsin, not sufficient basis to support §2(a) jurisdiction where ice cream was both manufactured and sold in Illinois.)



*Opinion of the Court*

giving of discriminatory prices by sellers. *American Motor Specialties v. FTC*, 278 F.2d 225, 228 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).<sup>8</sup> In *Automatic Canteen*, *supra*, the court laid stress on the knowledge requirement of §2(f) proceedings, holding:

"If the requirement of knowledge in §2(f) has any significant function, it is to indicate that the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense from the seller, nevertheless proceeded to exert pressure for lower prices." 346 U.S. at 79.

In reviewing this phase of the case, we are limited by the statutory directive that "[t]he findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C. §21(c). Put another way, "[t]he appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts." *FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 760 (1945); *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934); *Foremost Dairies v. FTC*, *supra*; *Callaghan & Co. v. FTC*, 163 F.2d 359, 372 (2d Cir. 1947). Looking, then, at only some of the evidence presented by the Commission, it is clear that a *prima facie* case of illegal price discriminations knowingly induced or received by a buyer was made out. The Administrative Law Judge's thorough initial decision in this case set out the higher prices paid

---

<sup>8</sup> A similar formulation of the §2(f) *prima facie* case is as follows:

"Thus, the buyer's *prima facie* violation arises upon proof that the discriminatory concession in his favor was sizable enough to create competitive injury, and that furthermore the nature of the discrimination placed him on notice of its probable illegality." (Emphasis in original.) *Rowe, Price Discrimination under The Robinson-Patman Act*, §14.7, at 438 (1962).

*Opinion of the Court*

by A & P's competitors for milk substantially identical to that purchased by A & P under the private label agreement in the Gary-Hammond and Valparaiso areas of Indiana, resulting in price discriminations ranging from 22.5 per cent to 5.9 per cent.

The conclusion that these substantial discriminations were injurious to competition is supported by A & P's admission that fluid milk is one of the most important commodities carried in retail grocery stores and that milk products are "sometimes used as price leaders which are tagged below the normal market price to draw customers to a store where it is hoped the customer will purchase additional products . . . ." A & P also admitted that profit margins have been "notoriously low" in the retail grocery business. Putting these three factors together, the Administrative Law Judge concluded that if A & P's competitors had received the larger discounts obtained by A & P through the private label agreement, they would have increased their net profits and could have been more competitive with A & P. It is, therefore, clear that there was substantial evidence presented to show a "reasonable possibility," *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948); or probability, *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680-81 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), of adverse effects on competition.

Turning to the "knowledge" requirement of §2(f), the Administrative Law Judge was guided by *Automatic Canteen's, supra*, requirement that, to make out a *prima facie* case, the Commission must initially show only that A & P knew that the methods by which it was served and the quantities in which it purchased were the same as in the case of its competitors, or, if the methods or quantities differ, "The Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only

*Opinion of the Court*

differences, should have known that they could not give rise to sufficient cost savings." 346 U.S. at 80. The purpose of making such a showing is to demonstrate that the discriminatory prices induced or received by the buyer were not justified by lower costs to the seller and were thus prohibited by §2(a) of the Robinson-Patman Act. The evidence here showed that A & P was purchasing Borden-label milk at the same prices charged to its competitors, that A & P was no novice in the dairy industry and had discussed pricing patterns in the Chicago area with Borden officials (facts which went towards showing the buyer's "trade experience" referred to in *Automatic Canteen*, *supra*, 346 U.S. at 79-80) and that Borden had informed A & P upon making its final and winning bid that it could not justify its prices on other than a "meeting competition" basis. This last statement, ruled the Administrative Law Judge, placed on A & P "the duty to inquire to determine whether its prices were legal," citing *Fred Meyer, Inc. v. FTC*, 359 F.2d 351, 365-66 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968). In addition, there was evidence that Borden had provided A & P with cost data during the private label negotiations showing that Borden would incur losses or gain no more than minimal profits on the private label agreement. Further, A & P had resisted cost increases on both Borden label and A & P label milk, after the initiation of the private label service, finally accepting increases on Borden-label milk and proportionately smaller ones on A & P label milk, even though A & P stores were serviced in exactly the same way as to both private label and Borden-label milk. In short, the evidence as to A & P's knowledge that Borden could not cost justify its prices was plainly substantial and may not be disturbed on this petition for review.

Faced with a *prima facie* case of §2(f) liability, however, the buyer may rebut the charge by resorting to statutory

*Opinion of the Court*

defenses available to sellers. The major defenses are that the lower prices offered were “made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor,” 15 U.S.C. §13(b), (the “meeting competition” defense) and that the lower prices made “only due allowance” for cost differences to the seller in servicing a particular customer, 15 U.S.C. §13(a) (the “cost justification” defense). In addition, and primarily to give substance to §2(f)’s requirement that only those illegal prices knowingly induced or received by a buyer can form the basis of buyer liability, the Supreme Court ruled in *Automatic Canteen, supra*:

“We therefore conclude that a buyer is not liable under §2(f) if the lower prices he induces are *either* within one of the seller’s defenses such as the cost of justification *or* not known by him not to be within one of those defenses.” 346 U.S. at 74. (Emphasis added.)

A & P defended its behavior below by invoking both the “meeting competition” and “cost justification” defenses. As to the first of these we agree with the Commission that A & P could not assert the “meeting competition” defense because in 1965, at the time of the private label negotiations, A & P concluded that Borden’s bid was “‘substantially better’” or lower than Bowman’s, *A & P, — F.T.C. at —, — ¶21,150 at 21,044*. A & P also argued that a 1973 comparison of the Borden bid with the Bowman bid disclosed Borden’s to be higher. The Commission concluded, however, on the basis of substantial evidence, that Bowman’s bid was in fact higher than Borden’s. *A & P, — F.T.C. at —, ¶21,150 at 21,044*. Knowing, therefore, that Borden’s final bid not only met, but substantially bettered Bowman’s, A & P accepted the prices in question. The Commission’s holding and rationale were to a large extent grounded on *Kroger Co. v. FTC*, 438 F.2d 1372 (6th

*Opinion of the Court*

Cir.), *cert. denied*, 404 U.S. 871 (1971), another §2(f) proceeding against a retail grocery chain in which the buyer gave false price information to a seller during negotiations for private label milk service, thereby inducing illegal price discriminations. The seller, Beatrice Foods, was absolved of wrongdoing by the Commission because it was in fact responding in good faith to what it believed to be, but which in fact was not, a competitive bid, *Beatrice Foods*, 76 F.T.C. 719 (1969). The buyer, Kroger Co., however, did not escape liability. The Sixth Circuit ruled that Beatrice's absolution from §2(a) liability did not *ipso facto* exonerate Kroger because *Automatic Canteen, supra*, did not warrant such a result and "[t]o hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices." 438 F.2d at 1377. The court went on to rule:

"In order for the buyer to be sheltered through the exoneration of the seller under Section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer." *Id.*

In support of its petition for review, A & P first argues that under *Automatic Canteen, supra*, it was entitled to a "meeting competition" defense because it had every reason to believe that had Borden been charged with knowingly giving illegally discriminatory prices (it was not, pursuant to the Commission's discretion, *see FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967)), it could have successfully pled its good faith effort to meet Bowman's allegedly competitive bid. We do not agree. While Borden may well have been *under the impression* that the terms of its final offer merely met the Bowman bid, A & P knew *for a fact* that the final Borden bid was substantially below "meeting competition" and beat the Bowman bid by a

*Opinion of the Court*

good margin. As A & P itself recognizes, the Supreme Court in *Automatic Canteen* interpreted Congress' intent in enacting §2(f) as seeking to reach those buyers who, knowing full well of the little likelihood of a defense for the seller, "nevertheless proceeded to exert pressure for lower prices." 346 U.S. at 79. A & P became one of the buyers Congress was concerned with, when it pressured Borden into a second bid which in fact went beyond the bounds of "meeting competition" and went a long way below it. In short, the Sixth Circuit's rule in *Kroger* that where, in a §2(f) proceeding, the buyer interposes a "meeting competition" defense, the facts must be viewed from the point of view of the buyer as well as that of the seller, is consistent with *Automatic Canteen's supra*, maxim that buyers may induce or receive prices, which sellers can *in fact* offer, consistent with the Robinson-Patman Act. 346 U.S. at 70-71. Here, Borden's final bid was not *in fact* sheltered by the "meeting competition" defense. *See, Curtis, Buyer Liability under The Robinson-Patman Act*, 42 ABA Antitrust L.J. 345, 351-2 (1973).

Indeed, to rule otherwise would emasculate *Automatic Canteen, supra*, and the purpose of §2(f) in that large buyers could consistently play one seller off against another to the point where all bids are below seller's costs and then in reliance upon the seller's potential good faith and its "meeting competition" defenses, thus vindicate the final price. Such tactics would ultimately result in the acquisition of increased, and perhaps overwhelming, market power by the large buyer, all to the ultimate competitive detriment of the buyer's competitors. In addition, toleration of such abusive behavior by buyers would, in most cases, favor the largest seller, the ones most able to bear the losses resulting from such a competitive situation, with the further result of ultimate anticompetitive effects among sellers. *See generally, Rowe, supra*, §2.1 at 28.



*Opinion of the Court*

That is, in the situation where the seller is unaware of what the buyer is doing (admittedly the rare case), the seller would, in effect, be engaging in predatory price cutting without his knowledge. While the seller may legally escape §2(a) liability in such a situation because of an assumed "meeting competition" defense, adopting A & P's argument in this case would not be, in the final analysis, in the public interest. As noted by the Supreme Court in *Utah Pie Co. v. Continental Baking*, 386 U.S. 685 (1967), a suit under §§1 and 2 of the Sherman Act and §2(a) of the Robinson-Patman Act, "the [Robinson-Patman] Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact." 386 U.S. at 703.

A & P's views regarding the buyer's use of a "meeting competition" defense contrast sharply with the legislative origins of the defense under §2 of the Clayton Act of 1914. Congress was concerned on the one hand with the Seller's ability to defend himself against local competition without having to cut prices in all areas where it did business, and on the other with the position of a seller trying to enter a new territory by cutting prices only locally. H. Rep. No. 627, 63rd Cong., 2d Sess., pt. 2, at 2-3 (1914); *Rowe, supra*, §9.1 at 208-9.

A & P goes on to argue, however, that even if we find *Kroger, supra*, persuasive, it should not be followed in this case, because the Kroger Co. had been found to be a "lying buyer" in its negotiations with Beatrice, while in the present controversy, A & P has been exonerated under §5 of the Federal Trade Commission Act, 15 U.S.C. §45, for its behavior during negotiations with Borden. This argument is extended to include the assertion that it is simply inconsistent for the Commission to exonerate A & P from charges of unfair trade practices and still hold it liable for a §2(f) violation. The net effect of this resolution, argues

*Opinion of the Court*

A & P, would be nonetheless to require buyers in the future affirmatively to disclose to a bidder that its bid had not only met, but substantially beaten, that of a competitor. Such a result would allegedly run counter to the public interest in vigorous and competitive price bargaining.

Again we reject these superficially attractive arguments. While *Kroger* did indeed involve a "lying buyer," we do not regard the Sixth Circuit's ruling as strictly limited to the situation where the charged buyer affirmatively lied to the seller. The rule that the "meeting competition" defense must be looked at from the buyer's perspective where the buyer is charged under §2(f) is a salutary and correct one, whether the buyer lies or merely keeps quiet about the nature of the competing bid it has already been offered, for the policy reasons stated *supra*. Further, the line between affirmative misrepresentation, as in *Kroger*, and the present case, where Borden was told it was not "in the ballpark" and that a \$50,000 reduction would not be a "drop in the pocket", is a fine one indeed. *Kroger* is, therefore, relevant to the present controversy and its sound reasoning must be applied here.

The seeming inconsistency between a finding of §2(f) liability and exoneration under a charge of unfair trade practices is, in turn, more apparent than real. One commentator recently opined with regard to this very case that "Section 5 [of the Federal Trade Commission Act, 15 U.S.C. §45] should not be used for reaching instances of price discrimination which are covered (either explicitly included or excluded) by the Robinson-Patman Act." Reeves, *Toward a Coherent Antitrust Policy: The Role of Section 5 of the Federal Trade Commission Act in Price Discrimination Regulation*, 16 B.C. Ind. & Comm. L. Rev. 151, 198 (1975).<sup>9</sup> That is, where a §2(f) violation can be

---

<sup>9</sup> The Reeves article discusses only the FTC's complaint in the present case and was published prior to the Administrative Law Judge's initial decision in the case.

*Opinion of the Court*

made out by sufficient competent evidence, there is neither need nor reason to invoke the Federal Trade Commission Act. While we express no opinion as to when and under what circumstances the Commission may or may not charge a violation of the Federal Trade Commission Act,<sup>10</sup> the point here is that A & P's liability under §2(f) must be independently assessed without regard to any other statute, so that a finding that A & P has not engaged in unfair trade practices does not, *ipso facto*, absolve A & P under §2(f).

We hold that in this case and under these circumstances, the Commission properly deprived A & P of Borden's potential "meeting competition" defense.

Turning then to the "cost justification" defense, it is now settled that a buyer charged under §2(f) may defend on the alternative grounds that the prices induced or received were in fact cost justified to the seller or that the buyer did not know or could not reasonably have known that the prices were not cost justified to the seller. *Automatic Canteen, supra*, 346 U.S. at 74. A & P attempted to defend on the first ground of the "cost justification" defense through three cost studies, which purported to show that Borden's final offer was within its costs. The methodology and underlying bases of these studies were analyzed at length by the Administrative Law Judge, who concluded that:

"A & P's cost justification studies . . . are so defective and inadequate as to furnish no evidentiary basis for justifying A & P's preferential price for private label items on the basis of Borden's savings in cost."

The above conclusion was adopted by the Commission, *A & P*, — FTC at —, ¶21,150 at 21,047-48. The A & P

---

<sup>10</sup> For an excellent analysis and summary of past and present FTC practice under §5 of the Federal Trade Commission Act, 15 U.S.C. §45, see Rice, *Consumer Transactions*, Ch. 8 (1975).

*Opinion of the Court*

studies were flawed in a variety of respects, many of which were attributable to the preparer's unfamiliarity with Borden's operations in the Chicago area. For example, as to delivery costs, the largest single expense item after the direct material costs of dairy products, the Administrative Law Judge excluded A & P's studies because they were originally based on wholesale milk delivery time standards prepared by the management consulting firm of Case & Co., and the underlying data supporting the conclusions reached on these studies was not produced. Further, the computation of Borden's processing costs at its Woodstock, Illinois facility was likewise flawed; instead of computing those costs directly, A & P's cost analyst first determined "unit cost" at Borden's two Wisconsin dairies and then multiplied by the number of units produced at the Woodstock plant to arrive at total Woodstock cost, assuming Wisconsin unit costs. The final figure was adjusted to reflect the fact that the Woodstock plant had higher labor costs but lower non-labor costs than the Wisconsin plants. The Commission agreed with the Administrative Law Judge that such a roundabout method of cost computation was not "reliable."

A & P nonetheless argues that the Commission acted improperly in rejecting its cost studies, in that they were made in good faith and in accordance with sound accounting principles, entitling them to "a very great weight." *Minneapolis-Honeywell Regulatory Co.*, 44 F.T.C. 351, 394 (1948). While it is, of course, true that a cost study will not be invalidated merely because one method of computation was used over another, *FTC v. Standard Motor Products Inc.*, 371 F.2d 613, 622 (2d Cir. 1967), for to do so would be to place unfair strictures on the party preparing the cost study where one method of computation is as fair and accurate as the next, the problems with the instant studies are that they were at some points internally inconsistent and at others simply inaccurate, *A & P*,

*Opinion of the Court*

— F.T.C. at —, ¶21,150 at 21,048. The net result of A & P's efforts could not, therefore, be relied on.

Thus, A & P was unsuccessful in showing that Borden's final prices for private label milk were cost justified in fact, the first ground of the "cost justification" defense. On the other hand, the Commission did not itself submit a cost study to show the absence of cost justification.<sup>11</sup> A finding of §2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification. This seemingly anomalous situation is naturally seized upon by A & P, which argues that the Commission's decision "stand[s] *Automatic Canteen* on its head" by assuming that the FTC "can show that the buyer was 'reasonably aware' that the prices were not cost justified without showing that they were in fact, not cost justified." Our reading of *Automatic Canteen, supra*, does not, however, support the proposition that the Commission must, in all cases, show as part of its *prima facie* case that the prices induced or received by the buyer were not in fact cost justified.

In *Automatic Canteen, supra*, the Court rejected the FTC's contention that a *prima facie* case of §2(f) liability was made out where price differentials were shown and where the buyer knew "only that the prices are lower than

---

<sup>11</sup> The only other evidentiary material as regards cost justification was the Borden figures disclosed by Joseph Malone, which indicated that Borden would either lose money or make minimal profits on the A & P private label arrangement. The Commission did not consider those figures as a formal cost study, however, *A & P, — F.T.C. at —, n. 25, ¶21,150 at 21,046 n. 25*, and took them into account only as they served to demonstrate A & P's knowledge of the probability of a lack of cost justification: "Although the [Malone] data may not be completely accurate, it demonstrates that A & P at least had knowledge that the discounts could drastically affect Borden's profits, and therefore, A & P should have inquired whether the prices were available to others. See *Fred Meyer, Inc. v. FTC, supra*, 359 F.2d at 365-67." *A & P, — F.T.C. at —, ¶21,150 at 21,046*. (Footnote omitted.)

*Opinion of the Court*

those offered other buyers.” 346 at 71. In giving content to the §2(f) requirement that the prices induced or received by the buyer must be knowingly in violation of §2(a), however, the Court refrained from the opposite, and equally extreme, position, namely that the Commission must always prove the absence of cost justification in fact. Charting, instead, a middle course based both on the statutory requirement of knowledge and on the difficulties of proof as regards cost justification, 346 U.S. at 79, the Court required the FTC henceforth to go forward with some evidence that the buyer knew that the discriminatory prices it was receiving could not be cost justified, including but not limited to, the buyer’s trade experience in a particular situation. 346 U.S. at 79-80. See Galanti, *Buyer Liability for Inducing or Receiving Discriminatory Prices, Terms, and Promotional Allowances: Caveat Emptor in the 1970’s*, 7 Ind. L. Rev. 962, 989-90 (1974). Consistent with its view that “[e]nforcement of the provisions of §2(f) against such a buyer should not be difficult,” 346 U.S. at 79, however, the Court made no mention of a requirement that the FTC show the absence of cost justification in fact through its own cost study.

This is not the first time that an argument similar to A & P’s has been advanced. In *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), *rev’d on other grounds*, 390 U.S. 341 (1968), the Commission’s first §2(f) proceeding against an individual buyer since *Automatic Canteen*, *supra*; Note, *The Evolving Duty of an Innocent Buyer to Inquire into His Bargain under Section 2(F) of The Robinson-Patman Act*, 49 Ind. L.J. 348, 357 (1974), an operator of a chain of 13 retail supermarkets was charged under §2(f) as a result of a promotional scheme which involved a “coupon book.” Each coupon entitled the purchaser to a price reduction on a particular product. Advertisers in the book paid a flat fee per coupon page and otherwise underwrote the promotion by volume-based re-



*Opinion of the Court*

ductions, replacing goods sold or redeeming coupons in cash at an agreed rate. 359 F.2d at 356. The Ninth Circuit ruled that in showing the buyer's knowledge that the price differentials resulting from the coupon promotion could not be cost justified, the FTC had carried its burden by adducing evidence that none of the sellers involved granted quantity discounts, that Meyer itself paid the "going price" of the goods during the 11 months of the year in which there was no promotion and that during the non-promotion months, Meyer paid the same price for the goods as did its competitors. In addition,

"[t]hat the Commission did not prove the costs of the suppliers is immaterial. Costs surveys are expensive and labyrinthine proceedings whose results are often dependent upon the cost accounting theory used. To require them in all proceedings, even against buyers, would too often be an exercise in futility. At least when the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to its end, that of showing that the buyer 'is not an *unsuspecting recipient* of prohibited discriminations,' *Automatic Canteen*, 346 U.S. at 81, 73 S. Ct. at 1028. (Emphasis added.)" 359 F.2d at 364.

The above considerations are directly relevant to the present case, where the Commission showed, through substantial evidence (as summarized, *supra*) that A & P knew or reasonably should have known that the final price concessions it received from Borden were not cost justified. To here require the Commission to submit a formal cost study or other cost-measuring analysis, in addition to the testimony and other evidence it has already adduced, would go far towards foreclosing the possibility of a §2(f) proceeding even where all significant indications and factors point to the absence of cost justification and the likelihood

*Opinion of the Court*

of illegal price discriminations. Our result is, therefore, consistent with *Automatic Canteen's* concern with the "balance of convenience" in going forward with evidence in §2(f) cases, 346 U.S. at 74, as well as with the public interest in the enforcement of §2(f).

Having failed in showing actual cost justification, A & P was thus reduced to defending the §2(f) charge through a showing that it did not know, nor had any reason to know, that Borden's prices could not be cost justified. We have already ruled that the Commission established a *prima facie* showing of A & P's knowledge that the prices in question were *not* cost justified, consistent with its burden of proof on the issue, *Beatrice Foods Co.*, *supra*, 76 F.T.C. at 820; *Suburban Propane Gas Corp.*, 73 F.T.C. 1269, 1274-75 (1968), and thus may be brief in discussing A & P's arguments on this appeal. As set out in the Commission's opinion, A & P's major evidentiary rebuttals to the FTC's *prima facie* showing of knowledge were first, that Borden's letter to A & P after the conclusion of the private label negotiations in which Borden asserted that its prices were "proper under applicable law" and that it was prepared to defend them, was interpreted by A & P to mean that other supermarkets could enjoy the same low prices offered to A & P on a proportionately equal basis. The Commission concluded, however, that the Borden letter did not constitute the "customary assurances" of proportional price availability which led to the reasonable inferences that the prices were not generally available and not cost justified, *A & P*, — F.T.C. at —, ¶21,150 at 21,046. Such reasonable inferences may not be disturbed on appeal, *FTC v. A. E. Staley Manufacturing Co.*, *supra*, 324 U.S. at 760. Secondly, the Borden cost study prepared at the time of the private label negotiations and submitted to A & P, which purported to show losses or minimal profits by Borden as a result of private label service, was criticized by A & P as not "completely reliable," *A & P*, — FT.C.

*Opinion of the Court*

at —, ¶21,150 at 21,047. Again, while one view of this Borden study is that it was “salesman’s talk,” designed to impress A & P with the bargain it was being offered, an equally reasonable view, given that A & P did not contemporaneously criticize the study, is that A & P knew as well as Borden of the illegality of the bargain. Thirdly, in evaluating the reasonableness of Borden’s bid, A & P’s Smith used a “2-2-2 formula,” which reflects the general proposition that “a dairy can profitably sell milk for approximately six cents more per quart than the dairy’s cost for raw milk.”<sup>12</sup> *A & P*, — F.T.C. at —, ¶21,150 at 21,047 (footnote omitted). The Commission concluded that while the use of the formula was relevant to the issue of knowledge, it did not fully rebut the FTC’s *prima facie* showing of knowledge.

As to the Commission’s *prima facie* showing, A & P makes a variety of arguments, the thrust of which is that the evidence submitted as probative of A & P’s knowledge of illegal price discriminations could be easily explained as resulting from quite different factors and motivations. By way of example, the Commission found that after the commencement of private label service in 1975, Borden charged A & P two different prices for private label and Borden-label dairy products, even though, except for a small amount devoted to advertising Borden-label products, there was “no difference in the cost to Borden of private and branded products.” *A & P*, — F.T.C. at —, ¶21,150 at 21,047. From these facts, among others, the Commission inferred that A & P knew that any differences in service were not cost justified. A & P now argues that “[t]he mere fact that Borden’s prices to A & P for branded milk (delivered under similar conditions) were higher than for private label should perhaps have made A & P suspi-

---

<sup>12</sup> Two cents each are allocated for cartons, plant costs and profits, and delivery costs.

*Opinion of the Court*

cious that the brand label prices were too high, rather than the private label prices were too low." Such an argument essentially invites us to retry the facts and draw new inferences in this case, which we may not do. *FTC v. A. E. Staley Manufacturing Co.*, *supra*, 324 U.S. at 760. A & P's evidentiary and legal arguments as to the "cost justification" defense in support of its petition for review are unpersuasive.

We come to the last ground of the petition, namely that the Commission's final order was unnecessary and unduly broad. The order provided that in the future, A & P bear the burden of going forward with the "meeting competition" defense and also decreed the nationwide distribution of the order to A & P's operating divisions, as well as its suppliers of milk and other dairy products. Our scope of review is here limited by the principles that Congress has placed the primary responsibility for fashioning orders upon the Commission, *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957), and that the courts should not "lightly modify" the Commission's orders, *FTC v. Cement Institute*, 333 U.S. 683, 726 (1948). *See also*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *Fedders Corp. v. FTC*, 529 F.2d 1398, 1401-2 (2d Cir.), *cert. denied*, — U.S. — (1976). In addition the Commission has been consistently granted "wide discretion" in choosing a remedy "deemed adequate to cope with the unlawful practices" involved. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *FTC v. Mandel Bros.*, 359 U.S. 385, 392 (1959); *Fedders Corp. v. FTC*, *supra*, 529 F.2d at 1401.

With the above in mind, we first take up A & P's argument that the order was in any event unnecessary because A & P voluntarily terminated its private label arrangement with Borden in February of 1972, four months after the issuance of the complaint in this proceeding and over five years ago to date. While it may be true that a long delay in the proceedings, accompanied by significant

*Opinion of the Court*

changes in the market upon which the Commission's order will act, may be sufficient to warrant the remand of a case to the Commission for further evidence as to the present structure of the relevant market, *Columbia Broadcasting System, Inc. v. FTC*, 414 F.2d 974, 981-82 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970), the Commission here found that "[t]he dairy and retail food industries have not drastically changed in the last few years." *A & P*, — F.T.C. at —, ¶21,150 at 21,052. Further, in *Fedders Corp. v. FTC*, *supra*, a proceeding under §5(a) of the Federal Trade Commission Act, 5 U.S.C. §45(a), resulting from advertising misrepresentations, the petitioner had discontinued the unlawful activities *prior* to the filing of the Commission's complaint and had given written assurances that it would not resume them. Nonetheless, this court ruled that these factors would not bar a cease-and-desist order "where the public interest otherwise requires it. *Diener's Inc. v. FTC*, 161 U.S.App. D. C. 213, 494, F.2d 1132, 1133 (1974) (per curiam); *Cotherman v. FTC*, 417 F.2d 587, 595 (5th Cir. 1969); *Libby-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 418 (6th Cir. 1965)." 529 F.2d at 1403. Here, of course, the A & P-Borden private label arrangement was abandoned only *after* the filing of the FTC complaint, while the lengthy time span between the filing of the complaint and our review is, in large part, attributable to the complexity of the case as well as the inability of both parties to move this matter along. More important, milk continues to be a major product line for supermarkets while private label milk is commonly carried on the shelves of large supermarkets. As a result, it is clearly in the public interest to enforce the Commission's order.

As to the nationwide scope of the order, A & P argues that the evidence did not show that any A & P officer or employee at the division level or above was "guilty" of

*Opinion of the Court*

even the innocuous conduct alleged in the complaint, so that the order should be limited to A & P's "Chicago Unit." The fact remains, however, that the private label program was initiated by A & P's national headquarters in New York, and A & P's national director of purchases had a direct hand in accepting the final Borden bid here in question. In light of these factors, we cannot say that the Commission abused its "wide discretion," *Jacob Siegel Co. v. FTC, supra*, 327 U.S. at 611, in decreeing the nationwide distribution of the order.

It is also urged that the Commission's order providing that henceforth, A & P must carry the burden of going forward with a "meeting competition" defense is improper in that it shifts the burden of proof from the Commission to the petitioner. By its very terms, however, the order does not affect the burden of proof but only the burden of going forward, a distinction highlighted in *Automatic Canteen, supra*. See, *Rowe, supra*, §14.7 at 441. In a §2(f) proceeding, the Commission must continue to carry the burden of proving the knowing inducement or receipt of illegally discriminatory prices.

The petition for review is hereby denied, and enforcement of the order is granted.



**Order Granting Petition**

SUPREME COURT OF THE UNITED STATES

No. 77-654

---

GREAT ATLANTIC & PACIFIC TEA  
COMPANY, INC.,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION.

---

ORDER ALLOWING CERTIORARI. Filed March 20, 1978.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

Mr. Justice Stevens took no part in the consideration or decision of this petition.

